

FIGHTING IRAN WITH TRADE SANCTIONS¹

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The author rejects both extreme metaphors, “Great Satan” and “Evil Āyatollāhs,” but uses them only to reflect what some in each country think of the other. Accordingly, the metaphors are put in quotations throughout.

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I. FOUR ISSUES AND RESPONSES

How do American trade sanctions against Iran work? Have they worked? Championed by six American Presidents and sixteen Sessions of Congress, these sanctions against Iran have spanned nearly forty years. In that time, the bilateral relationship between the United States and Iran has been dreadful, with each side fixated on monstrosities perpetrated by the other: the 1953 *coup d'état* of a democratically-elected Iranian leader orchestrated by the United States; the subsequent American support for human rights abuses by the Peacock Throne; and the November 1979 seizure of the American Embassy in Tehran by Iranian militants and subsequent state-sponsored terrorist atrocities.

To Iran, America became the “Great Satan” to be confronted wherever and whenever possible. To the United States, Iran perpetrated “evil” and was to be targeted for sanctions. American trade sanctions against Iran thus became, and continue to be, an important part of international trade law. Around the globe, practice in this field is touched by the dysfunctional relationship between the “Great Satan” and “Evil” *Āyatollāhs*.

The practical significance does not mean that the technical rules, or policy justifications for those rules, are easily or well understood. The rules have become more intricate as they have evolved over nearly forty years. The policies for them have been subject to polarizing debates. Accordingly, four issues are addressed herein:

- (1) What transactions with Iran are prohibited?
- (2) What are the penalties for violating those prohibitions?
- (3) What is the logic for the regime of prohibitions and sanctions?
- (4) Have the sanctions worked?

In addressing the first two issues, three points are clear.

First, as intimated, American trade rules against Iran are complex. Navigating them is not for the faint-hearted, but doing so is essential in the everyday practice of international trade law around the globe. The sanctions cover not only trade in goods and services, but also foreign direct investment (FDI), transportation, banking, securities, and insurance.

Second, aside from their relevance, the American trade rules are a technically fascinating case study. They were imposed against a country that accounts for one percent of the world's population.² They were imposed despite the fact that Iran has no misunderstanding about the objective power asymmetry, exemplified when its Foreign Minister, Mohammad Javad Zarif, said in December 2013 to students at Tehran University: "Do you think the U.S., which can destroy all our military systems with one bomb, is scared of our military system?"³ The trade sanctions have had a considerable, but imperfect, extraterritorial reach, not only affecting third party countries, but cajoling them (or trying to) into ostracizing Iran. And, for critics and champions of the use of trade sanctions to effect political and national security goals in foreign countries, the case study of Iran gives both comfort and concern.

Third, Iran and third-party countries made clever adjustments to minimize, as best they could, adverse effects of the regime on them. Given those adjustments, the regime had to evolve. At inception, and for most of its life, it was not a comprehensive set of sanctions designed to put Iran, metaphorically speaking, in solitary confinement. Rather, as the types of transactions barred grew, so did the penalties for violating those bars.

The third issue admits an unequivocal answer: the regime has always served the dual purpose of denying Iran the ability to acquire a weapon of mass destruction (WMD) and stopping it from supporting terrorist organizations. As a victim of chemical weapons in the 1980-1988 Iran-Iraq War, Iran swore it had no interest in acquiring them. Accordingly, the key concern of the United States was that Iran not get a nuclear device or the operational means to deliver that device. As for terrorist groups, the principal (but not only) one of interest was *Hezbollah*.

² The population of Iran is nearly eighty million (as of July 2013). See *The World Factbook: Middle East; Iran*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html> (last visited Mar. 8, 2014). The world population is 7.1 billion. *The World Factbook: World*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (last visited Mar. 8, 2014).

³ Najmeh Bozorgmehr, *Zarif Pressed by Iran Hardliners*, FIN. TIMES, Dec. 10, 2013, at 2.

This answer begs two follow-up questions. First, given that the rules of the regime evolved, did the rationale for the regime ever change? While America never waived in its two original purposes, deterrence with respect to WMDs and terrorism, it did add a third rationale. Following the June 2009 to February 2010 Green Revolution, the United States viewed deterrence of human rights abuses as a third basis for the regime.

Second, why was acquisition by Iran of a nuclear weapon, or support for *Hezbollah*, America's problem? Unlike North Korea, Iran did not threaten the United States with a nuclear attack, and while *Hezbollah* inflicted deadly blows to Americans, it did not do so on American soil. The response – as politically incorrect as it may be to state – is that the primary threat was to Israel and Gulf Arab countries. Reasonable minds can and do differ as to whether such a threat is so problematic to the United States that it justifies not only the regime, but also an American military strike against Iran.

A single, clear response to the fourth issue is difficult, perhaps even imprudent. It is one of efficacy and should be dissected into three questions:

- (1) Were American trade sanctions against Iran necessary and sufficient to wreck the economy of Iran?
- (2) Were American trade sanctions necessary and sufficient to compel Iran to sign the November 2013 preliminary nuclear agreement?
- (3) Were American trade sanctions necessary and sufficient to achieve the three American policy goals for those sanctions, namely, to deny Iran a nuclear weapon, to convince Iran to cease support for international terrorism, and to promote human rights in Iran?

Here the answers are, respectively, “no,” “it depends,” and “it is uncertain.”

Until the November 2013 preliminary nuclear deal, sanctions looked set to become an epic failure. Iran met an ever more expansive and detailed array of American measures by spinning more centrifuges to enrich uranium. Accordingly, American rules failed to bring about their stated goals. The longer they dragged on, the more entrenched the two countries became. Between 1996 and 2012, the United States increased the severity of its sanctions regime, widening the range of forbidden transactions and boosting the number of prohibited activities and penalties. Concomitantly, the number of centrifuges spinning in Iranian nuclear facilities and the stockpile of highly enriched uranium grew, while terrorist acts continued, and the human rights environment changed minimally.

But, thanks to the November 2013 deal, sanctions one day may be viewed retrospectively as efficacious, because they appear to have played a necessary part in causing the economic collapse that resulted in its signing the November 2013 agreement. In terms of the first question, it appeared sanctions were necessary, but not sufficient, to wreck the economy of Iran. Sanctions could not have been sufficient, however, because they were not systematic or seamless from inception. Instead, they were a confusing array of haphazard measures, mostly targeted at the Iranian energy sector, but with plenty of gaps that later

needed plugging. Moreover, inefficient economic management and corruption in Iran were causal factors, without which the ever-more expansive and tighter regime might not have produced change.

On the second question, American and Iranian officials disagree on the role sanctions played in yielding the November 2013 accord. That the response “depends on who is asked” is not surprising. One side is eager to trumpet a foreign policy success, while the other seeks to show the world it was not cowed by foreign pressure. As to the third question, whether the American measures were necessary and sufficient to achieve all three-policy goals is not certain. Time will tell whether the net result of the sanctions is one the United States sought and with which Iran can live. Here, then, is a case study with lessons about the past to be revealed in the future.

II. TRAGEDY

On November 4, 1979, Iranian protestors stormed the United States Embassy in Tehran, taking and holding hostage fifty-two American citizens for 444 days. Ten days after the Embassy seizure, U.S. President Jimmy Carter imposed trade sanctions against Iran. Except for a six-year respite in the 1980s, America has imposed trade sanctions on Iran ever since. This has been true regardless of who was President, and which political party held power in Congress. Simply put, for nearly forty years, America has had a sanctions-based trade policy toward Iran. The template, conscious or not, for this policy may well have been Cuba. Since 1961,⁴ American trade policy toward what President John F. Kennedy called “that imprisoned island” has been nothing but sanctions.⁵

That policy looked unsuccessful, or (to use a contemporary youthful colloquialism) appeared to be an epic failure. American trade sanctions had not changed the behavior of Iran.⁶ Specifically, they had not achieved any of the

⁴ See COMM. ON WAYS & MEANS, 111ST CONG., OVERVIEW & COMPILATION OF U.S. TRADE STATUTES (Comm. Print 2013) [hereinafter OVERVIEW, PART II]. America’s trade embargo dates from the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified at 22 U.S.C. § 2370(a)(1)), and is explained in OVERVIEW, PART I at 267-70.

⁵ John F. Kennedy, Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba (Oct. 22, 1962), *available at* <http://microsites.jfklibrary.org/cmc/oct22/doc5.html>.

⁶ Hope springs eternal. The election in June 2013 of a relatively pragmatic, reform-minded President, Hassan Rouhani, offers the possibility that Iran may be more transparent with the United States about the operation of its nuclear program. It was Mr. Rouhani, a former nuclear negotiator, who convinced his government to suspend uranium enrichment between 2003 and 2005. He served as National Security Advisor to President Akbar Hashemi Rafsanjani, a pragmatist, and also to President Mohammad Khatami, a reformist. It was the latter capacity in which he agreed to suspend enrichment.

President Rouhani is well aware of the economic damage American sanctions have inflicted on Iran, and the desire of many Iranians to re-integrate into the global economy. But he surely appreciates America would ease those sanctions only if what he

goals embraced by six American Presidents, which were most clearly articulated by Bill Clinton (in 1996), and by every session of Congress from the 96th (1979-1980) to the 112th (2011-2012).⁷ Declaring sanctions to be a policy of containment to isolate Iran, the Clinton Administration claimed they were justified because of Iran's (1) efforts to develop Weapons of Mass Destruction and (2) support for international terrorism. Additional rationales for isolating Iran were its (3) subversion of certain governments in the Middle East, (4) undermining of the Arab-Israeli peace process, and (5) poor human rights record.⁸ Of these, the first two have loomed the largest for the United States, though human rights concerns resurfaced in 2012 as a pertinent rationale for an explicit prohibition. In no publicly observable or material way have the sanctions caused Iran to alter the impression of the United States on any of these five points.

The reasons for that apparent failure lay partly in inconsistencies in the sanctions themselves. Through successive legislation, the sanctions generally tightened the noose around Iran with ever-tougher measures, but also with provisions allowing for flexibility or creating ambiguity. Taken individually, indubitably a cogent argument existed in defense of each twist or relaxation. Taken collectively, the pattern – especially from the Iranian perspective – was not a series of outright flip-flops, to be sure, but was somewhat “on the one hand, . . . on the other hand,” and thus intimated occasional legislative tentativeness masked by bellicose rhetoric. In other words, it was not that each particular prohibition, sanction, exception, or waiver in isolation was indefensible. Rather, it was that,

seeks – constructive engagement and reconciliation – with other countries includes stringent limits on Iran's nuclear program.

Yet, his room to maneuver is limited, given the consistent hard line stance of *Āyatollāh* Ali Khamenei, the Supreme Leader of Iran. Akbar Ganji, *Who is Ali Khamenei?: The Worldview of Iran's Supreme Leader*, FOREIGN AFF., Sept.-Oct. 2013, at 25 (arguing Khamenei “is not a crazy, irrational, or reckless zealot searching for opportunities for aggression. But his deep-rooted views and intransigence are bound to make any negotiations with the West difficult . . .”). The Supreme Leader did not support the efforts of President Khatami to engage President Bill Clinton, and the next President Mahmoud Ahmedinejad spouted fiery, defiant, and sometimes objectionable rhetoric against America and her allies.

In effect, whether President Rouhani can satisfy the United States by submitting to its demands to drop its alleged nuclear weapons ambitions, without losing the support of the Supreme Leader and the Revolutionary Guard Corps that backs the *Āyatollāh*, is dubious. See Najmeh Bozorgmehr & Monavar Khalaj, *Rouhani Nuclear Pledge Raises Hopes for Change*, FIN. TIMES, June 18, 2013, at 6; Najmeh Bozorgmehr, *Tehran Crowds Take to Streets to Cheer Reformist's Triumph*, FIN. TIMES, June 17, 2013, at 3; James Blitz, *West Cautious as Cleric Unlikely to Soften Nuclear Stance Swiftly*, FIN. TIMES, June 17, 2013, at 2; Martin Indyk, *The West Must Temper Its Enthusiasm for Iran's New President*, FIN. TIMES, June 17, 2013, at 13.

⁷ For a chart of the sessions of Congress, see *Guide: Congressional Session Chart*, IND. UNIV. LIBR., <http://www.libraries.iub.edu/index.php?pageId=3373> (last visited Mar. 9, 2014).

⁸ See OVERVIEW, PART I, *supra* note 4, at 273.

viewed across almost four decades, the overall impression was that the sanctions regime had become an evolving work in progress lacking, from its very inception, adamant will and tenacious determination.

The reasons the sanctions seemed unsuccessful also lay in the limits of American sovereignty. Never has the long reach of American sanctions enforcement powers been endless or the intelligence necessary to exercise that power been flawless. The ability of third parties – whether allies, friends, or neutrals – to comply with American sanctions always has been limited. Wholly apart from their philosophical misgivings about those sanctions and the justification for them, the third parties faced domestic and international political constraints in that they could not easily subordinate to American trade policy. In sum, external political and economic factors America could not control, and internal legislative and regulatory factors that it could, were to blame for the four decades of apparent failure.

Both factors are ones the United States could have, and should have, foreseen. In their official postures, rarely did American policymakers respect Iran as an ancient and grand Persian civilization; understand the distinct nature of *Shī'ite* (much less Twelver *Shī'ism*) and empathize with the historical *Shī'ite* sense of persecution by *Sunnites*; consider modern Iranian sensibilities about the August 19, 1953 *coup d'état* – engineered by the American Central Intelligence Agency (CIA) and the British MI6 – of democratically elected Prime Minister Mohammad Mosaddegh (1882-1967)⁹ and subsequent human rights offenses committed by the American-backed Shah; or address claims by Iran about its right under the 1968 Nuclear Non-Proliferation Treaty (NPT) to develop peaceful nuclear technologies, much less Iranian allegations of American violations of the NPT.¹⁰ Instead, American officials tended to respond to the worst of Iranian rhetoric, especially former President Mahmoud Ahmadinejad's (1956–) hate speech against Israel and monstrous denials of the Holocaust. Rather than rising above the ugliness emanating from some quarters in Tehran and Qom, the officials forged a trade sanctions policy in response to it.

⁹ See *CIA Documents Acknowledge its Role in Iran's 1953 Coup*, BBC NEWS (Aug. 20, 2013), <http://www.bbc.co.uk/news/world-middle-east-23762970>. The United States and Britain were angered at the Prime Minister's nationalization of Iran's oil industry, which Britain effectively had controlled since 1913 through the Anglo-Persian Oil Company (APOC, sometimes called the Anglo-Iranian Oil Company, or AIOC). APOC later was renamed "British Petroleum" (BP). See DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER* (1991).

¹⁰ The NPT was concluded in 1968 and entered into force in 1970. There are 190 Parties, including Iran. Three nuclear nations, India, Pakistan, and North Korea (which withdrew in 2003), are not Parties. See *Treaty of the Non-Proliferation of Nuclear Weapons (NPT)*, U.N. OFF. FOR DISARMAMENT AFF., <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml> (last visited Mar. 15, 2014); *Treaty on the Non-Proliferation of Nuclear Weapons, Status of the Treaty*, U.N. OFF. FOR DISARMAMENT AFF., <http://disarmament.un.org/treaties/t/npt> (last visited Mar. 15, 2014).

To be sure, that ugliness is utterly indefensible. Nothing justifies Iranian threats to the Jewish State or Jews, or human rights violations committed by the Islamic Republic against its own people. Nothing justifies the ruthless suppression of the Green Revolution of June 13, 2009 to February 11, 2010, or of prior and subsequent democratic movements and their champions.¹¹ Nothing justifies terrorism or support for Violent Extremist Organizations (VEOs). Whether Iran has a right to peaceful nuclear technologies, or even nuclear weaponry, under the NPT is debatable, albeit a debate for another time. Likewise, whether Iran was truthful in its consistent contention that its nuclear program has been for peaceful purposes to help it generate electricity, and not for construction of an atomic weapon, is debatable.

What is certain, indeed palpable, are misunderstandings, ignorance, and hardheartedness on both sides. One side spoke of the leaders of the other as “Evil *Āyatollāhs*.” Those leaders painted the other side as the “Great Satan.” Their metaphors bespoke a tragic mutual hatred.

III. METRICS

Is it reasonable to consider American trade policy toward Iran as an “epic failure?” The answer depends on the characterization of that trade policy and benchmark for its success. What has been and is American trade policy toward Iran, and has it worked? Those answers, respectively, are “sanctions” and “no.” Of course, the work generated for lawyers has been outstanding. But surely the enrichment of the class of juridical service providers cannot be the sole cause to sustain any legal regime.

Stephen Kinzer, a Visiting Fellow at Brown University, former *New York Times* correspondent who has covered over fifty countries on five continents, and author of *Overthrow: America’s Century of Regime Change from Hawaii to Iraq*, summarized the reality:

¹¹ The dates of the Green Revolution are indicated at *Timeline: Iran After the Election*, AL JAZEERA, <http://www.aljazeera.com/focus/iran/2009/11/200911411259869709.html#> (last updated Feb. 11, 2010). American sanctions legislation does not list an end date, but it does indicate a start date one day earlier, namely, July 12, 2009. See Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, § 105B(b)(1), 124 Stat. 1312-51, *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214, Iran Freedom and Counter-Proliferation Act of 2012, Pub. L. 112-239, 126 Stat. 1263, Sub-title D of the National Defense Authorization Act for Fiscal Year 2013 (codified as 22 U.S.C. 8512, 8513a, 8514a, 8514b), *reprinted in* COMM. ON WAYS & MEANS, 113TH CONG., COMPILATION OF U.S. TRADE STATUTES 714-15 (Comm. Print 2013) [hereinafter 2013 COMPILATION] (concerning censorship as a sanctionable offense (discussed below)).

*Years of sanctions and threats have produced only more spinning centrifuges in Iran. An earnest diplomatic effort to give Iran an honorable alternative is long overdue.*¹²

Indeed, Mr. Kinzer argued that a different approach was the key not only to resolving America's nuclear dispute with Iran, but also to resolving Middle East regional conflicts:

That refusal [of the United States to engage Iran diplomatically] is rooted largely in emotion stemming from the hostage crisis of 1979-80 and the following decades of semi-covert conflict between Washington and Tehran. Emotion has pushed Washington to adopt doctrine that posits Iran as a *strategic enemy*, meaning that any security gain for Iran implies an American loss. By that logic, allowing Iran a voice in shaping a peace settlement for Syria – or in any Middle East process – would enhance Iran's legitimacy and therefore undermine U.S. interests.

....
This approach [of isolating Iran as an enemy] is misguided [T]he United States and Iran, though often rivals, have urgent security interests in common. Both want to calm Iraq and Afghanistan, deal with the Afghan drug trade and fight radical Sunni movements like the Taliban and al-Qaeda. Together they could do far more to achieve those goals than either can alone.

....
[N]o long-term stability in the Middle East is possible without the cooperation of Iran. *Look at a map of the region: Iran is the big country right in the middle.* Its cultural and political influence has been a dominant fact of regional life for thousands of years. Freezing it out of peace processes almost guarantees that those processes will fail.

....
[There is] the larger truth that negotiating with enemies and rivals is a way to promote national interest, not a concession or

¹² Stephen Kinzer, *To Resolve the Syrian Crisis, the U.S. Must Negotiate with Iran*, AL JAZEERA AM. (Sept. 4, 2013), <http://america.aljazeera.com/articles/2013/9/4/to-resolve-the-syriacrisistheusmustnegotiatewithiran.html> (emphasis added).

In this regard, the news that President Barack H. Obama and President Hassan Rouhani exchanged letters concerning Syria, and later spoke briefly by telephone, was welcome. See Roula Khalaf, Lionel Barber & Najmeh Bozorgmehr, *Rouhani's 100-Day Revolution*, FIN. TIMES, Dec. 1, 2013, at 6; Syria Hails U.S.-Russia Deal on Chemical Weapons, BBC NEWS (Sept. 15, 2013), <http://www.bbc.co.uk/news/world-middle-east-24100296>.

surrender. Hostility between powers – like the United States and Iran – should be an incentive to negotiate, not a barrier.¹³

America and American sanctions, it seemed, did not matter to the “Evil *Āyatollāhs*” in Tehran and Qom, yet it reinforced the metaphor from the Iranian perspective that the “Great Satan” was clinging ever more tightly to his scepter.¹⁴

Indubitably, the sanctions do matter to everyday Iranians throughout their country – from Tabriz, near Armenia, in the north to the Persian Gulf port of Bandar-e Abbās in the south, and from the western boundaries with Turkey and Iraq to the eastern borders with Turkmenistan, Afghanistan, and Pakistan. Have they inflicted economic pain on Iran? Yes, though some of that pain has been self-inflicted (as discussed later). Have the sanctions hurt innocents in Iran? Almost certainly, yes. Commodities and services enjoyed by a healthy middle class are in short supply. Have these effects inspired greater affection on the Iranian street, and in towns and villages across the Persian landscape, for either the American or Iranian government? Probably not. Have they at least provoked a “rally around the flag” effect in Iran, i.e., a sense of love of country if not of its politics? Probably, yes.

Have the sanctions helped America understand Iran or its special position in Islamic history and religion any better?¹⁵ No. Few Americans could identify the first three *Shī‘ite* Imāms, or the Twelfth one, who has remained in occultation since roughly 940 A.D. They would be shocked to learn orthodox Twelver *Shī‘ite* belief holds that the Hidden Imām will come out of occultation and, with Jesus Christ, return to the world to restore peace and justice before a Day of Final Judgment. Have the sanctions altered the self-image of Iran? No. It is keenly aware it is the only *Shī‘ite* nation in the world, and only the second one in history (the first being *Fatimid* Egypt). Its Constitution, written and approved after the 1979 Islamic Revolution, bespeaks its self-proclaimed role of guardian of *Shī‘ism* and exporter of its sense of socially just revolution on behalf of the poor and oppressed.

Misunderstanding turned to hardheartedness, hardheartedness to prejudice, and prejudice to hatred. Trade sanctions facilitated, if not contributed to, this tragic course. An unclear effect of the stated aim of compelling Iran to abandon its suspected clandestine nuclear weapons program has manifested one obvious result: a fat set of laws. American sanctions on Iran span no less than sixty-two single-spaced pages (depending on page, font size, and minor exclusions). That figure, which grew over time with each new try, covered only

¹³ Kinzer, *supra* note 12.

¹⁴ Notably, in November 2013, the Foreign Minister of Iran, Mohammad Javad Zarif (1960–), said to the BBC: “[W]e need to come to understand that a sectarian divide on the Islamic world is a threat to all of us.” David Gardner, *Iran Can Be Made a Force for Middle East Peace*, FIN. TIMES, Nov. 24, 2013, at 7.

¹⁵ Concerning the points about *Shī‘ism* made herein, see RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARĪ‘A) chs. 8-9 (2011).

the statutory regime specifically targeting Iran. It excluded dozens of pages of regulations.

Was there, then, a justification for this regime? The conventional wisdom was “yes.” This wisdom said that without sanctions, Iran would have acquired nuclear weapons and would have sponsored even more boldly terrorist organizations. The obvious rebuttal is that it was not “wisdom,” but speculation about a historical counterfactual question: what would have happened had there been no sanctions regime?

A different kind of wisdom would have been to say that without the sanctions, Iran might not have been a pariah state, and might boast a burgeoning emerging market. It might have been more akin to Turkey than North Korea. It might even have become the first Islamic BRICS (Brazil, Russia, India, China and South Africa) nation, and a new acronym – the I-BRICS – might have been needed. After all, without sanctions, Iran could have earned and had full access to export oil revenues, petrochemical products, and precious metals; invested them wisely in long-term infrastructure and human capital development projects; and diversified its economy so that it was less reliant on petroleum. After all, Iran incurred an opportunity cost because it could not exploit its energy and natural resources sectors via foreign market sales. It could not use foreign earnings from those sectors to fund development and gain an international competitive advantage in non-energy sectors. And, without sanctions on imports of refined gasoline and against access to world financial markets and payments systems, Iran might not have felt, or reacted with, hostility.

So, again, was there a justification – one that did not rely on counterfactual speculation – for the sanctions? The answer is “yes.” The first justification lay in Just War Theory as developed, *inter alia*, by Catholic moral theologians. The use of force is unjust, unless it comports with specific criteria, one of which is that it is truly the last resort to resolving a problem. All other efforts must be exhausted first. Such efforts may include sanctions. Accordingly, it may be argued that if armed conflict is to occur between America and Iran, it could be rationalized – if at all – as the last resort under Just War Theory because sanctions were tried and failed. Of course, this rationalization would be parlous on either of two grounds: the sanctions were merely a prelude to war, and another last resort – diplomacy – was tried in good faith and failed.

The second justification lay in deontology. Rather than utilitarianism, the better – perhaps only sure – argument for trade sanctions against Iran is that if, indeed, the behavior of Iran is sinful, even evil, then America ought not to sully itself dealing with that country. Whether sanctions effect a change in Iranian behavior then become a secondary matter. Of primary importance is the effect on the American soul of dealing with a perpetrator of bad acts. Put in individual terms, the idea is that “I do not want to damage my soul by selling to or buying from Iran because of what I understand to be official Iranian behavior with respect of atomic weapons and terrorism.” However, a deontological justification never has been the official American one. Rather, consequentialism has been the cornerstone.

Even in the unlikely event the rationale were to change, despite some evidence that utilitarian calculations across four decades appeared negative for the United States, the sanctions regime would require modification. To focus on the effect of dealing with Iran has on the American soul – that doing so is morally bad for Americans – is not a value judgment that the United States ought to impose on other countries or peoples. Thus, the secondary boycott features of American sanctions against Iran, which target foreign entities, would need to be dropped. It would be up to foreign parties, based on the free exercise of their conscience, to decide whether and to what extent they feel morally concerned about working with Iran.

IV. FIRST 3 OF 10 PHASES TO 1996

To ask whether American trade rules against Iran worked presumes an understanding of how they worked. That, in turn, requires appreciation of how and why they developed over time.

There have been ten phases of American trade sanctions against Iran (outlined below).¹⁶ Of course, it is possible to view them as a totality of rules as of the present day, but that static picture would veil an insight: since 1979, and especially since 1996, the United States has tightened sanctions progressively on Iran, but until the November 2013 interim nuclear deal, Iranian behavior changed little, if at all, with regard to the outcomes America sought from the sanctions.

The United States applied sanctions to a broader range of commercial and financial transactions, identifying an ever-larger number of prohibited forms of business conduct. It insisted on an extraterritorial scope to these prohibitions. America mandated an ever-increasing number of penalties for violating the prohibitions. Still, Iran does what it does. Metaphorically, the “*Evil Āyatollāhs*” did what they did in their neighborhood playground, the Near East, to the irritation of the “*Great Satan*.” The more they did in disregard of the “*Great Satan*,” the hotter the “*Great Satan*” got, but each new flame it sent up (or over) only emboldened them.

The first three Phases of American sanctions against Iran were:

Phase 1: Carter Era

November 14, 1979 through January 19, 1981

Phase 2: Respite Era

January 19, 1981 through October 29, 1987

Phase 3: Reagan-Clinton Era

October 29, 1987 through August 5, 1996

¹⁶ To be sure, this figure depends on how the legal history of the sanctions is organized.

The first three phases are discussed elsewhere.¹⁷

The focus here is on the subsequent evolution of the sanctions. In reviewing them, it is important to note, as a practical matter, that all the sanctions apply. That is, the evolution is cumulative: one set of sanctions does not substitute another, but rather supplements all previous sanctions. Each of the Ten Phases, perhaps especially the last seven, might be tellingly described as a “try,” that is, an effort to knock out the specter of Iran obtaining a WMD, particularly a nuclear weapon, and to deter it from sponsoring terrorism and abusing the human rights of its citizens.¹⁸

¹⁷ See RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE ch. 19 (3d ed. 2008); Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1 (1997).

¹⁸ Starting in 2006, Iran was the target of four rounds of United Nations Security Council sanctions. See *Iran Says Geneva Nuclear Deal Possible on Friday*, BBC NEWS (Nov. 7, 2013), www.bbc.co.uk/news/world-middle-east-24857981. Both the United States and European Union have implemented their own sanctions regime to reinforce that of the United Nations. GATT Article XXI(c) justifies the American and European sanctions: they concern atomic weapons proliferation (covered by Article XXI(b)(i)) and are taken pursuant to United Nations Security Council Resolutions (encompassed by Article XXI(c)). While not discussed herein, United Nations sanctions are less comprehensive and aggressive than American trade sanctions.

This discussion focuses on the American sanctions regime. For a brief summary of these sanctions, followed by an overview of European, Canadian, and South Korean trade measures against Iran, see Edward J. Krauland & Anthony Rapa, *Between Scylla and Charybdis: Identifying and Managing Secondary Sanctions Risks Arising from Commercial Relationships with Iran*, 15 BUS. L. INT’L 3 (2014). Appendix A of that article provides a synopsis of non-United States persons on which sanctions were imposed between October 2010 and May 2013.

V. PHASE 4: 1996 ILSA EMPHASIS ON PETROLEUM

A. ILSA, Subsequent Strengthening, and Five Practical Questions

President Clinton signed the Iran and Libya Sanctions Act (ILSA) on August 5, 1996.¹⁹ ILSA – which was renamed the Iran Sanctions Act in 2006 under the Iran Freedom Support Act – became the most significant statutory enactment against Iran. It remained so until 2010 when Congress passed, and President Barack H. Obama signed, another key bill. Overall, Congress strengthened the baseline 1996 statute no fewer than six times via:

- (1) ILSA Extension Act of 2001,²⁰
- (2) Iran Freedom Support Act of 2006,²¹
- (3) Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA),²²
- (4) National Defense Authorization Act of 2012,²³
- (5) Iran Threat Reduction and Syria Human Rights Act of 2012,²⁴ and

¹⁹ Iran and Libya Sanctions Act of 1996, Pub. L. 104-72, 110 Stat. 1541-51 (codified as 50 U.S.C. § 1701 note), *reprinted in* OVERVIEW, PART I, *supra* note 4, at 273-74. The effective date of the ILSA was the date of enactment, August 5, 1996. *Id.* § 13(a); *see also* Iran Sanctions Act of 1996 § 13(a), 50 U.S.C. § 1701 note, *reprinted in* COMM. ON WAYS & MEANS, 111ST CONG., OVERVIEW & COMPILATION OF U.S. TRADE STATUTES 1147 (Comm. Print 2013) [hereinafter OVERVIEW, PART II].

²⁰ ILSA Extension Act of 2001, Pub. L. 107-24, 115 Stat. 199-200 (enacted Aug. 3, 2001) (amending Iran and Libya Sanctions Act of 1996).

²¹ Iran Freedom Support Act, Pub. L. 109-293, 120 Stat. 344-50 (enacted Sept. 30, 2006) (amending Iran Sanctions Act of 1996). The features of this and successor legislation dealing with Libya are not discussed herein. *But see* Bhala, *Fighting Bad Guys*, *supra* note 17 (assessing sanctions on both Iran and Libya). Likewise, aspects of the sanctions regime touching on Iraq – for example, the ILSA Extension Act mandate that the President report to Congress on the effect of sanctions on humanitarian interests in Iraq – are not discussed in this article.

Herein, statutory references are to ILSA including amendments to it through successive legislation. The amendments, and when and why they occurred, are explained below, with appropriate citations to OVERVIEW, PART I, *supra* note 4, OVERVIEW, PART II, *supra* note 19, and 2013 COMPILATION, *supra* note 11.

²² Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, 124 Stat. 1312-51 (enacted July 1, 2010) (codified at 22 U.S.C. § 8501 note & 50 U.S.C. § 1701 note) (amending Iran Sanctions Act of 1996).

²³ National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 1245, 125 Stat. 1298, 1647-50 (codified at 22 U.S.C. § 8513a). This Act did not amend either the 1996 or 2010 legislation, but rather supplemented them with an additional prohibition concerning Iranian financial institutions, including the Central Bank of Iran.

²⁴ Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214-69 (amending Iran Sanctions Act of 1996 and Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010). The 2012 legislation also supplemented section 1245 of the National Defense Authorization Act for Fiscal Year of

(6) Iran Freedom and Counter-Proliferation Act of 2012 (Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013)²⁵

Not only did these six Acts amend ILSA, but the fourth and fifth Acts also changed the 2010 Act, which with ILSA became the second of the two most important statutes targeting Iran. In turn, the 2010 Act also altered ILSA.²⁶

Not surprisingly, for the practitioner and scholar alike, and a fortiori for a domestic or foreign commercial or financial enterprise seeking in good faith to stay on the right side of American justice, the accretion of legislative enactments is dizzying. To understand the sanctions, it is necessary to study ILSA and CISADA, plus sections of those enactments codified in other titles, especially Title 22, and thereafter consult pertinent provisions of the Code of Federal Regulations (C.F.R.).²⁷

Perhaps the easiest path through the legal thicket is to keep these five practical questions in mind:

- (1) Prohibitions: What transactions are prohibited?
- (2) Penalties: What are the possible sanctions for engaging in a prohibited transaction?
- (3) Scope: To what, or to whom, are the prohibitions and sanctions applicable?
- (4) Exceptions: What limitations on, or outright exemptions to, the prohibitions and sanctions exist?
- (5) End Game: What, if any, criteria exist for removing the prohibitions and terminating the sanctions?

The first two questions highlight the fact that a punishment is imposed for committing a transgression. The third question identifies the breadth of application of the rules. The fourth and fifth questions search for flexibility in the rules.

2012, codified at 22 U.S.C. § 8513a, in respect of financial sanctions against Iran and the third country short supply exception. (These points are discussed below.) The National Defense Authorization Act was amended further by the Iran Freedom and Counter-Proliferation Act of 2012, which is Sub-Title D, Title XII, of the National Defense Authorization Act for Fiscal Year 2013.

²⁵ National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, Sub-Title D, 126 Stat. 1632 (enacted Jan. 2, 2013) (codified at 22 U.S.C. §§ 8801-11).

²⁶ See Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, at *parenthetical note*, reprinted in 2013 COMPILATION, *supra* note 11, at 708 (concerning 2012 amendments to 2010 law); Iran Sanctions Act of 1996, at *parenthetical note*, reprinted in 2013 COMPILATION, *supra* note 11, at 685 (concerning 2010 amendments to 1996 law).

²⁷ Additionally, recourse to legislative history and various issuances from pertinent United States authorities is helpful, and in specific client matters, likely to be essential. Research into these sources was beyond the present scope.

B. Crossing the Rubicon with ILSA (August 5, 1996 Through September 30, 2006)

ILSA, which dates back to the 104th Congress,²⁸ marked a significant legal and political shift in American sanctions policy against Iran.²⁹ Until ILSA, the International Emergency Economic Powers Act (IEEPA) and Presidential Executive Orders were the legal mechanisms used to implement that policy.³⁰ Using the broad discretion delegated by the Legislative branch to the Executive branch, the President, not Congress, principally determined what sanctions to put on Iran, and how to implement them. Yet, inside and outside the Senate and House, doubts arose as to whether this approach was effective in coaxing other countries to punish Iran. To shift international attitudes, in third countries as well as Iran, Congress passed ILSA.

Congress stated (in findings contained in ILSA) that Iran's behavior was adverse to American national security in two ways: it sought to acquire WMDs and it supported international terrorism.³¹ To further these pursuits, Iran used its governmental and quasi-governmental facilities outside of its territory.³² Then-extant bilateral and multilateral efforts to deter the country were ineffective. Thus, sanctions with real "bite" – ones that cut into Iranian revenues – were needed.³³ Iranian behavior threatened the national security (and foreign policy) interests of the United States and its allies and friends, hence Congress:

[D]eclare[d] that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran.³⁴

²⁸ See *Guide: Congressional Session Chart*, *supra* note 7.

²⁹ The statute defines "Iran" as "any agency or instrumentality of Iran." Iran Sanctions Act of 1996 § 14(10), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1148. Albeit circular, this definition suggests a distinction between the government and people.

³⁰ International Emergency Economic Power Act, Pub. L. 95-223, Title II, 91 Stat. 1626 (enacted Dec. 28, 1977).

³¹ See Iran Sanctions Act of 1996 § 2(1)-(3), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1133.

³² The statute speaks of "Iranian diplomats and representatives of other government and military or quasi-military institutions of Iran," and lists such entities. They include the Foreign, Intelligence and Security, Interior Ministries, Revolutionary Guards, and several Foundations. See *id.* § 14(11), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1148.

³³ See *id.* § 2(2)-(3), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1133.

³⁴ See *id.* § 2(2), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1133. The statutory definition of "act of international terrorism" is discussed *infra* note 81.

So, in ILSA, Congress mandated sanctions against two types of transactions: (1) foreign investment in the development of the petroleum sector of Iran; and (2) exportation of sensitive weaponry, both WMDs and advanced conventional ordnance, to Iran.³⁵

With its legal and political shift via ILSA, and its findings in ILSA, Congress crossed the Rubicon. Was there to be any more debate about whether Iran had the legal right under the NPT to develop peaceful atomic energy, or even perhaps acquire nuclear weapons? No. Was there to be any more debate about why Iran might be supporting terrorism, and what other measures might deter it from doing so? No. In 1996, six years before President George W. Bush declared in his 2002 State of the Union Address that Iran was part of an “axis of evil” (along with Cuba and North Korea), Congress declared Iran to be so.³⁶

To be sure, Congress still encouraged the President to pursue multilateral channels. Indeed, ILSA obliged the President to report on his efforts:

[T]o mount a multilateral campaign to persuade all countries to pressure Iran to cease its nuclear, chemical, biological, and missile weapons programs and its support of acts of international terrorism³⁷

In addition, the President had to report to Congress on his efforts to get other countries to reduce their diplomatic ties with Iran and expel any Iranian representatives who participated in the November 4, 1979 takeover of the American Embassy or holding of hostages during the 444 days afterwards;³⁸ the use by Iran of diplomats to acquire WMDs or promote terrorism;³⁹ and the inspection activities of the International Atomic Energy Agency of nuclear facilities (actual or under construction) in Iran.⁴⁰

But the purpose of pursuing multilateral efforts is manifest from the nature of the reporting obligation about them: Congress did not seek to talk with Iran; rather, it wanted stringent sanctions on Iran to “limit[] the development of [Iran’s] petroleum resources . . . [so as to] inhibit Iran’s efforts to acquire WMDs or support terrorism.”⁴¹

³⁵ See *id.* § 5(a)(1), (b), reprinted in OVERVIEW, PART II, *supra* note 19, at 1136, 1138.

³⁶ The pertinent excerpt from the January 29, 2002 speech may be viewed at KellyWurx Films, *President Bush Axis of Evil Speech*, YOUTUBE (Apr. 2, 2013), <http://www.youtube.com/watch?v=btkJhAM7hZw>.

³⁷ See Iran Sanctions Act of 1996 § 10(a)(1), reprinted in OVERVIEW, PART II, *supra* note 19, at 1145.

³⁸ See *id.* § 10(a)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1145.

³⁹ See *id.* § 10(a)(4), reprinted in OVERVIEW, PART II, *supra* note 19, at 1145.

⁴⁰ See *id.* § 10(a)(3), reprinted in OVERVIEW, PART II, *supra* note 19, at 1146.

⁴¹ See *id.* § 4(a), reprinted in OVERVIEW, PART II, *supra* note 19, at 1133. In addition, section 4(b) mandated Presidential reports to the “appropriate congressional committees” on countries that have and have not agreed to support America in its policy

C. Two Sanctions for Petroleum Resource Development and Sensitive Weaponry Export Prohibitions

With ILSA, Congress aimed to strike Iran's most significant revenue-generating sector: energy. Perhaps Iranian support for the likes of *Hezbollah* and its efforts to acquire nuclear arms technology would be thwarted if Iran did not have funds to cover those expenses. Where else did the bulk of that funding come from but oil exports? In addition, what else made oil exportation possible, but foreign investment in exploration, drilling, and transportation of oil in Iran for onward shipment abroad?

Moreover, via ILSA, Congress specifically targeted any "foreign person." Therein lay a key shift in American strategy, and another feature of the Rubicon crossing. Sanctions were no longer just a primary boycott, barring Americans from dealing with Iran. With ILSA, they became a secondary boycott: no one else was supposed to deal with Iran either, at least not in the petroleum sector. The definition of "foreign person" was broad, covering (1) an individual (regardless of citizenship), firm, be it a partnership, corporation, or other form of business association, and (2) government enterprise, thereby including a wholly or partly state-owned enterprise (SOE) or state-trading enterprise (STE). The trigger for sanctions under ILSA (later revised, as discussed below) was U.S. \$40 million.

The first transaction ILSA forbade, the *actus reus* (culpable act) was any "investment that directly and significantly contributes to the enhancement of Iran's ability to develop petroleum resources."⁴² "Petroleum resources" was defined broadly: it referred not only to "petroleum" (i.e., crude oil), "refined petroleum products," "oil or liquefied natural gas" (LNG), and "natural gas resources," but also to tankers and products used to build or maintain pipelines for transporting oil or natural gas.⁴³ In turn, "refined petroleum products" covered gasoline, diesel, and jet fuel.⁴⁴ So, the term "petroleum resources" covered the entire sector pertaining to this form of energy.

Without clarification, the key terms "directly and significantly" could be read to ensnare virtually any economic transaction connected to that sector,

toward Iran. Those committees were the Senate Committee on Banking, Housing, and Urban Affairs and the Committee on Foreign Relations, as well as the House Committees of Foreign Affairs, Financial Services, and Ways and Means. *See id.* § 14(2), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1147 (defining "appropriate congressional committees"). The same committees are referred to throughout the legislation as "appropriate congressional committees." *See, e.g., id.* § 4(d), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135 (concerning interim reports on multilateral sanctions and monitoring).

⁴² *See* Iran Sanctions Act of 1996 § 5(a)(1)(b), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1136.

⁴³ *See id.* § 14(5), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1149.

⁴⁴ *See id.* § 14(16), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1149.

including providing buttons for Iranian petroleum workers' uniforms and shoelaces for their shoes, distributing bottled water to them, or selling them goods such as prescription eyeglasses or pharmaceuticals like aspirin, which could be considered an "investment." After all, clothes, shoes, water, glasses, and aspirin are all used by those workers, and without them they could not easily perform their duties. Unfortunately, ILSA provided no guidance as to the meaning of "directly and significantly."

What the statute did define was "investment" and "develop and development." An "investment" was any agreement with the government of Iran, or a non-governmental entity in Iran, involving: (1) a contract that includes responsibility for "the development of petroleum resources" in Iran (including supervising or guaranteeing that another person will perform such a contract); (2) taking a share ownership (such as an equity interest) in "that development"; or (3) a contract for participating in any form in the "royalties, earnings, or profits of that development."⁴⁵ To "develop" those Iranian petroleum resources was to explore for them, extract or refine them, or transport them by pipeline.⁴⁶ Do those definitions, however, suggested a contract to provide Iranian workers with clothes, shoes, water, glasses, and aspirin was covered if those workers engaged in petroleum exploration, extraction, refining, or pipeline transportation, and that work was judged direct and significant? The answer is no under prongs (2) or (3), because no share ownership or profit sharing redounds to the suppliers of the clothes, shoes, water, glasses, or aspirin. However, the answer might be yes under prong (1), insofar as these items help guarantee that the workers can develop Iranian petroleum resources. Admittedly that would be a strained interpretation, but not one denied by the definitions if an aggressive approach is preferred.

ILSA did not establish a strict liability offense. Rather, it contained a *mens rea* (culpable intent) requirement: "knowingly." ILSA defined the term broadly to include actual or constructive knowledge: if a foreign person actually knew, or should have known, of the conduct, circumstance, or result in respect of an investment in the Iranian petroleum resources sector, then that sufficed.⁴⁷

As to the second prohibited transaction, ILSA took aim at helping Iran develop WMDs or certain other military capabilities.⁴⁸ It was illegal for any foreign person to export, transfer, or otherwise provide to Iran:

⁴⁵ See *id.* § 14(9), reprinted in OVERVIEW, PART II, *supra* note 19, at 1148. The pertinent date at which such contracts became illegal was the date of enactment of ILSA, which was its effective date. See *id.* § 13(a), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147. Any amendment to a contract made on or after June 13, 2001 (a few weeks before the entry into force of the ILSA Extension Act) to a pre-existing contract was considered entry into a contract and thus was forbidden. See *id.* § 13(a), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147.

⁴⁶ See *id.* § 14(4), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147. Likewise, such activities would constitute "development."

⁴⁷ See Iran Sanctions Act of 1996 § 14(12), reprinted in OVERVIEW, PART II, *supra* note 19, at 1149

⁴⁸ See *id.* § 5(b), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138.

[A]ny goods, services, technology, or other items *knowing* that the provision of such goods, services, technologies, or other items *would contribute materially* to the ability of Iran to –

- (A) [A]cquire or develop *chemical, biological, or nuclear weapons or related technologies*; or
- (B) [A]cquire or develop *destabilizing* numbers and types of *advanced* conventional weapons.⁴⁹

The statute did not define “chemical” or “biological” weapons, nor did it identify what conventional weapons were “advanced,” or how many of them would be “destabilizing.” It offered precision only in respect of “nuclear” weapons, saying a “nuclear explosive device” was any item (assembled or disassembled) “designed to produce an instantaneous release of . . . nuclear energy from special nuclear material . . . greater than the . . . energy . . . from” detonating one pound of trinitrotoluene.⁵⁰

Like the first offense, this offense was not a strict liability one: the foreign person had to know the items shipped to Iran would help Iran in its weapons programs. Moreover, as the italicized terms indicate, the contribution had to be “material,” and as to conventional weapons, they had to be both “advanced” and in “destabilizing numbers.” Assuredly, a missile designed to carry a conventional weapon would qualify, all the more so if the item transferred to Iran would help it modify the missile to carry a nuclear payload.⁵¹ But, as to WMDs, “related technologies” were enough, and as to both categories of ordnance, the items shipped need not have been weapons. Any item that helped Iran “develop” the forbidden weapons could not be sent to Iran. So, for example, information from research conducted in a laboratory at the University of Kansas School of Engineering was within the scope of banned material. That meant faculty had to take special care in sharing information with research assistants, particularly ones from overseas.

In sum, ILSA, as originally conceived, targeted the development of Iranian petroleum resources.⁵² (As explained below, later changes to ILSA added several more sectoral targets, plus individual ones, such as the production of refined petroleum products in Iran, and the exportation of refined petroleum

⁴⁹ See *id.* § 5(b)(1), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138. “Goods and technology” are defined in section 14(8) in the same manner as in section 16 of the 1979 *Export Administration Act* (50 U.S.C. App. § 2415), but “services” is not expressly defined. See *id.* § 14(8), reprinted in OVERVIEW, PART II, *supra* note 19, at 1148.

⁵⁰ See Iran Sanctions Act of 1996 § 14(13), reprinted in OVERVIEW, PART II, *supra* note 19, at 1149.

⁵¹ See *id.* § 5(b)(2)(A), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138 (mentioning “missiles or advanced conventional weapons that are designed or modified to deliver a nuclear weapon”).

⁵² See *id.* § 5(a), reprinted in OVERVIEW, PART II, *supra* note 19, at 1135-36.

products to Iran). Any foreign person investing more than U.S. \$40 million in any one year in the country's petroleum sector was liable.⁵³ The period of measurement was one year, and multiple investments that equaled or exceeded the threshold were illegal. Thus, a foreign person could not lawfully structure a transaction into a series of smaller ones and expect that they were going to be treated in isolation.

ILSA required the President to impose two of six sanctions on a foreign person that transgressed its prohibitions, referred to as the "sanctioned person" or "sanctioned entity."⁵⁴

(1) Export Financing Sanction:⁵⁵

The United States Export-Import Bank (Ex-Im Bank) had to refuse to grant any loan to finance exports of goods or services to a sanctioned person. Such financing otherwise included Ex-Im Bank issuance of a guarantee, insurance, extension of credit, or participation by the Bank in a credit syndicate.

(2) Export License Sanction:⁵⁶

A sanctioned person was prohibited from obtaining a specific license for exports of controlled items. Such items were controlled under the Export Administration Act of 1979, Arms Export Control Act of 1976, Atomic Energy Act of 1954, or any other legislation mandating prior review and approval as a condition for export or re-export of goods or services.

Note that ILSA contained a second kind of Export License Sanction, which applied specifically in instances in which the prohibition against exportation of sensitive weaponry was violated.⁵⁷ No license for the export, transfer, or re-transfer, direct or indirect, of nuclear material, facilities, components, or related goods, services, or technology, could be issued to the government of any country with primary jurisdiction over a person who violates that prohibition. This additional species of Export License Sanction was designed to coax foreign governments to police their citizens and residents against shipping WMDs or destabilizing numbers and types of advanced conventional weapons to Iran.

⁵³ See *id.* § 5(a)(1)(A), reprinted in OVERVIEW, PART II, *supra* note 19, at 1136. As explained below, the ILSA Extension Act of 2001 reduced the permissible investment threshold to U.S. \$20 million. See OVERVIEW, PART I, *supra* note 4, at 274.

⁵⁴ See *id.* § 5(c), reprinted in OVERVIEW, PART II, *supra* note 19, at 1139.

⁵⁵ See Iran Sanctions Act of 1996 § 6(a)(1), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

⁵⁶ See *id.* § 6(a)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

⁵⁷ See *id.* § 5(b)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138.

This second species was a qualified one. The President need not have imposed the sanction if (1) the government of the pertinent country neither knew nor had reason to know about its person violating the prohibition, (2) that government had taken “all reasonable steps necessary” to prevent a recurrence of the violation and penalize the person, or (3) the approval, on a case-by-case basis, of an export license was “vital to the national security interests of the United States.”⁵⁸

(3) American Bank Loans Sanction:⁵⁹

Any American bank was obliged to deny a sanctioned person any loan over U.S. \$10 million in one year. Any United States “financial institution” was defined to include any depository institution, credit union, securities firm (e.g., broker or dealer), insurance company, or other financial services provider in the United States, including a branch or agency of a foreign bank in the United States.⁶⁰ The financial institution was barred from providing loans or credits totaling annually U.S. \$10 million to a sanctioned person, unless that person helped “relieve human suffering,”⁶¹ and the financing was for that purpose.

(4) Primary Dealer and Repository Sanctions:⁶²

Any sanctioned person that was an American or foreign “financial institution” had to be disallowed from serving as a primary dealer of, or repository for, United States government funds. “Financial institution” meant any depository institution, credit union, securities firm (e.g., broker or dealer), insurance company, or other financial services provider based or operating anywhere in the world. So, the sanctioned financial institution had to be barred from serving as a primary dealer in United States government Treasury securities for

⁵⁸ See *id.* § 5(b)(2)(B)-(C), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138-39. As to the first two grounds for exception for imposing the Sanction, the President had to give notification to the appropriate congressional committees. See *id.* § 5(b)(2)(B)(i)-(ii), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138-39. As to the third ground, which resulted in issuance of a license despite a violation, the President had to justify doing so to the Senate Committee on Foreign Affairs and House Committee on Foreign Relations. See *id.* § 5(b)(2)(C)(ii), reprinted in OVERVIEW, PART II, *supra* note 19, at 1138-39.

⁵⁹ See *id.* § 6(a)(3), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

⁶⁰ See Iran Sanctions Act of 1996 § 14(5), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147. The ILSA incorporates by reference the definition of “financial institution” from section 3(c)(1) of the Federal Deposit Insurance Act of 1950 and the definition of a foreign bank “branch” or “agency” from section 1(b)(7) of the International Banking Act of 1978. See *id.*, reprinted in OVERVIEW, PART II, *supra* note 19, at 1147.

⁶¹ See *id.* § 6(a)(3), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

⁶² See *id.* § 6(a)(4)(A)-(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

the Federal Reserve Bank of New York, or a repository for United States government funds as agent for the United States government.⁶³ Note that primary dealer status was (and is) considered on Wall Street to be both prestigious and potentially lucrative.

(5) Government Procurement Sanction:⁶⁴

A sanctioned entity had to be excluded from United States government procurement contracts. That is, the United States government had to refuse to procure goods or services from that entity. Though not expressly mentioned, presumably, coverage extended to intangible merchandise, such as software or databases, and to intellectual property (IP).

(6) Additional Sanctions:⁶⁵

Import sanctions declared by the President under the IEEPA had to be applied to imports from a sanctioned person.⁶⁶ The point of such additional IEEPA sanctions was to prevent importation of goods (and, presumably, services) from the sanctioned entity into the United States.

Sanctions (unless waived, as discussed below) had to remain in place for at least two years from the date of imposition, or until such time (not less than one year) when the President received “reliable assurances” that the sanctioned person had ceased engagement in any prohibited activity, and would not do so knowingly again.⁶⁷

Sanctions decisions were not subject to judicial review.⁶⁸ Presumably, a court might decline jurisdiction under the political question doctrine, but the

⁶³ This sanction is potentially two separate sanctions. If a financial institution is denied primary dealer status, or its status as such is revoked, then that action is considered one sanction. If it also is barred from serving as a repository, or its ability to serve as such is revoked, that action is considered a second sanction. *Id.* § 6(a)(4), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141.

⁶⁴ *See id.* § 6(a)(5), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141.

⁶⁵ *See* Iran Sanctions Act of 1996 § 6(a)(9), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1142.

⁶⁶ *See* International Emergency Economic Power Act, Pub. L. 95-223, § 202, 91 Stat. 1626 (1977).

⁶⁷ Iran Sanctions Act of 1996 § 9(b), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1144.

⁶⁸ *See id.* § 6(a)(9), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1142. The President must report to the appropriate congressional committee his rationale for the waiver. His report must discuss the nature and significance for Iran’s acquisition of WMDs, or destabilizing numbers and types of advanced conventional weapons of the prohibited

statute avoided that matter by making it clear that a Presidential decision to impose sanctions is not reviewable by any court.

Waiver of sanctions was possible as a general matter and via delay. ILSA authorized the President to waive imposition of any otherwise-mandatory sanction if he decided that “it [wa]s necessary to the national interest” of the United States to do so.⁶⁹ Obviously, the criterion is open-ended: any interest, be it national security or otherwise, may be a justification, and the President decided what was “necessary.” The President could delay for up to ninety days (renewable for a second ninety-day period) imposition of sanctions, if Congress urged him to do so, and in lieu of imposing a punishment, pursue a diplomatic course.⁷⁰ Specifically, Congress could call upon the President, and the President could determine that the government of the country with primary jurisdiction over the sanctioned person “ha[d] taken specific and effective actions, including, as appropriate, the imposition of appropriate penalties” to end the illegal conduct with Iran.⁷¹

So, for example, suppose the Malaysian energy company, Petronas, invests in the petroleum sector of Iran in an amount above the trigger threshold. The President could waive sanctions, if imposing them on Petronas would damage America’s national interests. Perhaps many American companies have energy contracts with Petronas and an interest in bidding on energy projects in Malaysia. Petronas and the Malaysian government might retaliate against such companies, if the President imposes sanctions. Or, at least, the President might turn to the Malaysian government for satisfaction that it is disciplining Petronas in some way. Here, then, would be grounds for waiver or delay, respectively.

Relatedly, ILSA created two incentives for joining a multilateral sanctions regime led by the United States against Iran.⁷² As a positive incentive, the President could waive sanctions against any foreign person from a country that joined such a regime. As a negative incentive, ILSA dropped the trigger limit for permissible investment from U.S. \$40 to \$20 million for any person from a country that did not join.

conduct in which the sanctioned person engaged; the actions of the government holding primary jurisdiction over the person to end or penalize that conduct; and the possible American responses if the person resumes the conduct. *See id.* § 9(c)(2), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1142.

⁶⁹ *Id.* § 9(c)(1), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1145.

⁷⁰ *Id.* § 9(a)(1), (3), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1144. The President must report to Congress about the consultations and his decision in favor of delay. *See id.* § 9(a)(4), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1144.

⁷¹ *Id.* § 9(a)(2), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1144.

⁷² *See also* Iran Sanctions Act of 1996 § 4(d), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135 (calling for an interim report from the President to the appropriate congressional committees on multilateral sanctions as to (1) whether Australia, the European Union, Israel, or Japan have trade sanctions on persons or their affiliates from doing business with or investing in Iran, and if so, their duration and effect; and (2) any decisions under the General Agreement on Tariffs and Trade (GATT) or World Trade Organization (WTO) on sanctions against Iran).

All such sanctions, of course, fell into the category of “on the one hand,” i.e., disciplines to enforce compliance. The legislation also contained “on the other hand” provisions designed to balance disciplines with flexibilities. The President did not have to impose a sanction if:

- (1) Doing so would inhibit procurement of defense articles or services under existing contracts or subcontracts (including option contracts “to satisfy requirements essential to the national security of the United States,” or co-production agreements for goods or services “essential to the national security”);⁷³
- (2) The person to be sanctioned was “a sole source supplier” of those articles, and those articles were “essential” and no substitute was “readily or reasonably available”;⁷⁴
- (3) At issue were eligible countries and merchandise under the WTO Agreement on Government Procurement (GPA) or a pertinent free trade agreement (FTA);⁷⁵
- (4) The items involved were (i) pipeline goods, services, or technology (i.e., items contracted for before the identity of the sanctioned person appeared in the Federal Register),⁷⁶ (ii) spare parts, components, or information technology “essential” to American production or products, or routine servicing and maintenance of products where no alternative arrangements were “readily or reasonably available,”⁷⁷ or (iii) medicines, medical supplies, or other “humanitarian items.”⁷⁸

The first two exceptions manifestly were self-interested for defense items essential to national security and other items essential to American manufacturing. The third exception, for humanitarian reasons, comported with principles of human dignity and minimizing harm to innocent life.

How might Iran have escaped from ILSA sanctions? The 1996 legislation contained two termination criteria.⁷⁹ They matched the purposes of the statute: Iran had to drop its WMD ambitions and stop supporting terrorism. Never mind the possibility that Iran might have to prove the negative (e.g., that it did not actually pursue a WMD). The termination criteria were linked to American

⁷³ *Id.* § 5(f)(1)(A)(C), reprinted in OVERVIEW, PART II, *supra* note 19, at 1140.

⁷⁴ *Id.* § 5(f)(1)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1140.

⁷⁵ *See id.* § 5(f)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1140.

⁷⁶ *See id.* § 5(f)(3), reprinted in OVERVIEW, PART II, *supra* note 19, at 1140.

⁷⁷ Iran Sanctions Act of 1996 § 5(f)(4), (6), reprinted in OVERVIEW, PART II, *supra* note 19, at 1140.

⁷⁸ *Id.* § 5(f)(7), reprinted in OVERVIEW, PART II, *supra* note 19, at 1140.

⁷⁹ *See id.* § 8(1)-(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1143-44.

suspicious about Iranian behavior, and those suspicions underpinned the prohibitions and sanctions.

The first criterion was that Iran “has ceased its efforts to design, develop, manufacture, or acquire” a nuclear bomb, chemical or biological weapons, or ballistic missiles or ballistic missile launch technology.⁸⁰ The second criterion was that Iran “has been removed” from the list of countries that (under section 6(j) of the 1979 Export Administration Act) “have been determined . . . to have repeatedly provided support for acts of international terrorism.”⁸¹ Both criteria required Presidential certification to the appropriate Congressional committees, and both had to be met for termination.

⁸⁰ *Id.* § 8(1)(A)-(C), reprinted in OVERVIEW, PART II, *supra* note 19, at 1143.

⁸¹ *Id.* § 8(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1144. The statute defined an “act of international terrorism” as any act that is (1) “violent or dangerous to human life,” (2) violates Federal or State criminal law (or would do so if committed in the United States or a State), and (3) “appears . . . intended” to “intimidate or coerce a civilian population,” to influence government policy by intimidation or coercion, or to affect government conduct by assassination or kidnapping.” *Id.* § 14(A), reprinted in OVERVIEW, PART II, *supra* note 19, at 1144. Note there was no link between the act and ideology, i.e., there is no requirement the act be done in pursuit of a religious or political agenda. That absence distinguished this definition from others used in the United States. See BHALA, *supra* note 15, § 50.01[A]. Moreover, there was no requirement in the Iran Sanctions Act definition that the civilian or government target be American. See Iran Sanctions Act of 1996 § 14(1), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147.

VI. PHASES 5 AND 6: 2001 ILSA EXTENSION, 2006 IFSA, AND EXTRATERRITORIALITY

A. Phase 5: ILSA Extension (August 5, 2001 Through September 29, 2006)

ILSA contained a five-year Sunset Rule, meaning that, but for renewal, it would have lapsed on August 5, 2001. It did not lapse, because the 107th Congress produced the ILSA Extension Act of 2001.⁸² Aside from extending ILSA until September 29, 2006, the Extension Act both strengthened the sanctions and Congressional oversight.

First, the 2001 Extension Act lowered the threshold from U.S. \$40 to \$20 million for investment in Iranian petroleum resources that triggered mandatory sanctions against any foreign person.⁸³ This eliminated a differential trigger that ILSA designed to discourage noncompliance with the multilateral sanctions regime. Since no such regime existed, why not tighten the noose around Iran's most strategic economic sector?

Second, via the Extension Act, Congress took another significant step in closely managing American trade policy toward Iran. Congress required the President to report to it on three questions:

- (1) Were the sanctions achieving their national security objectives?⁸⁴
- (2) What effect did the sanctions have on humanitarian interests in Iran, a country in which a sanctioned person is located, or other countries?⁸⁵
- (3) What impact did the sanctions have on other American security and economic interests, "including relations with countries friendly to the United States," and on the American economy?⁸⁶

Each such matter was sensible enough to warrant the President to report, but two points were critical to Congress' decision.

First, the third matter easily allowed for sanctions to be evaluated according to Israeli and Gulf Arab interests. They are countries "friendly" to America. If these friends thought the sanctions useful – as they tended to – then so, too, would many in Congress. Second, predictably, the report largely

⁸² See Iran and Libya Sanctions Act of 2001, Pub. L. 107-124, 115 Stat. 199-200 (codified at 50 U.S.C. § 1701 note), reprinted in OVERVIEW, PART I, *supra* note 4, at 274; *Guide: Congressional Session Chart*, *supra* note 7. To extend ILSA, Section 4 of the Extension Act amended Section 13(b) of ILSA. The renewals and extensions of ILSA are summarized in *International Law Advisory – Renewal of ILSA Sanctions on Iran*, STEPTOE (Oct. 3, 2006), <http://www.steptoelaw.com/publications-3867.html>.

⁸³ See OVERVIEW, PART I, *supra* note 4, at 274.

⁸⁴ See Iran Sanctions Act of 1996 § 10(b)(1)(A), reprinted in OVERVIEW, PART II, *supra* note 19, at 1146.

⁸⁵ See *id.* § 10(b)(1)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1146.

⁸⁶ See *id.* § 10(b)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1146.

supported the sanctions regime, with one branch of government (the Executive) echoing what the other (the Legislature) wanted to hear.⁸⁷ Yet, arguably a robust response to these questions would have been (1) “no, or at least, not clear,” (2) “possibly hurting innocent people,” and (3) “annoying, if not alienating, certain friends and allies, including India and Japan.” Consider each suggestion in turn.

First, during that period, Iran had not abandoned its nuclear energy program, or forsworn weapons of mass destruction. Second, in contrast to Burmese opposition leader Aung San Suu Kyi (1945–), who called upon the world to boycott the regime of General Than Shwe (1933–), Iranian opposition figures had not clearly done so.⁸⁸ In other words, Mrs. Suu Kyi and her National League for Democracy (NLD) were willing to accept the pain of sanctions. The situation in Iran was different: continued sanctions risked giving the *Āyatollāh*’s regime an argument to galvanize people against foreign interference and, in effect, to rally around the flag. Third, the likes of India and Japan could not easily and quickly substitute Iran for other sources of energy. American sanctions inflicted difficulties on them at a time when their support, respectively, for fighting Islamist extremism and ensuring the peaceful rise of China was critical.

India is an important case in point of the way in which factors beyond the United States’ control may limit its sanctioning power. To meet its growing energy needs as an emerging country and member of BRICS (Brazil, Russia, India, China, and South Africa), India must import up to 80 percent of its energy. Iran is a historical trading partner for India: Mughal emperors like Shah Jahan (1592–1666) brought architects from Persia to design grand buildings, including the Taj Mahal. Manifestly, with some of the largest oil and natural gas reserves of any country in the world,⁸⁹ Iran has a comparative advantage over India in energy production, while India has a comparative advantage over Iran in agricultural goods like rice (a staple in Persian cuisine) and industrial products like generic pharmaceuticals.

As the value of the *rupee* depreciates against hard currencies like the United States dollar, energy prices in India rise, causing import-driven inflation. Poor people are hit particularly hard, and government funding to subsidize fuel for them is stretched. If India ceases all imports of Iranian energy, without adequate substitutes, then fuel prices rise. (In effect, the supply curve of energy available in the Indian domestic market shifts in, and if demand is steady or increases, then prices rise.)

⁸⁷ The report was due between 24 and 30 months after the date of enactment of the Extension Act, i.e., twenty-four to thirty months from September 30, 2006. *Id.* § 10(b), reprinted in OVERVIEW, PART II, *supra* note 19, at 1146.

⁸⁸ See generally Connie Ng, Comment, *Burma and the Road Forward: Lessons from Next Door and Possible Avenues Towards Constitutional and Democratic Development*, 53 SANTA CLARA L. REV. 267 (2013) (discussing the transition to democracy in Burma).

⁸⁹ See Yeganeh Torbati & Lesley Wroughton, *Kerry Meets Iran Foreign Minister to Close Gaps in Iran Nuclear Talks*, REUTERS (Nov. 8, 2013), <http://mobile.reuters.com/article/topNews/idUSBRE9A709G20131108?irpc=932>.

Indeed, American sanctions themselves may contribute to higher fuel prices, insofar as they keep Iranian oil off of the world market, thus artificially constricting supply (again, in effect, causing an inward shift in the supply curve). In India and many other developing countries, fuel price hikes are a well-known cause of social and political unrest, and many of India's poor also happen to be Muslim. Surely these factors weigh heavily in the calculations in South Block (the office of the Indian Prime Minister in New Delhi) when considering whether and how to accommodate pressure from the White House to "toe the line" on Iran.

B. Phase 6: IFSA (September 29, 2006 Through July 1, 2010)

But for the Iran Freedom Support Act (IFSA), American trade sanctions against Iran dating from 1996 under ILSA and renewed under the Extension Act until 2006 would have lapsed on September 29 of that year. Via IFSA, the 109th Congress extended the regime for another five years, specifically until December 31, 2011.⁹⁰ Cancelling sanctions against Libya, IFSA also changed the rubric from "ILSA" to "Iran Sanctions Act," or "ISA." IFSA loosened sanctions in one respect, and tightened them in three others.

As for relaxation of the sanctions, IFSA empowered the President to waive application of sanctions on a person of any country, for up to six months, "on a case by case basis," which otherwise would have been imposed on that person for investing in the development of Iranian petroleum resources.⁹¹ To exercise this authority, called a "General Waiver," the President needed to certify to the appropriate Congressional Committees that the waiver was "vital to the

⁹⁰ Iran Freedom Support Act, Pub. L. 109-293, 120 Stat. 344-50 (enacted Sept. 30, 2006) (codified at 50 U.S.C. § 1701 note); *see also* OVERVIEW, PART I, *supra* note 4, at 274. Section 204 contained the extended sunset date.

On April 23, 2004, President George W. Bush waived the application of sanctions on Libya because of the agreement of that country to abandon pursuit of WMDs and cooperate with the United States on counterterrorism. *See* Determination and Certification Under Section 8(b) of the Iran and Libya Sanctions Act, 69 Fed. Reg. 24,907 (Apr. 23, 2004); OVERVIEW, PART I, *supra* note 4, at 274. Pursuant to the Iran Freedom Support Act, enacted September 30, 2006, Libya no longer was subject to ILSA sanctions. *See id.* Under the 1996 legislation and ILSA Extension Act of 2001, the ISA initially was known as the Iran and Libya Sanctions Act. But when sanctions were removed on Libya under the 2006 Iran Freedom Support Act, the nomenclature of "Iran Sanctions Act," or "ISA," was used instead. *See* Iran Sanctions Act of 1996 § 1, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1133.

⁹¹ Iran Sanctions Act of 1996 § 4(c)(1)(A), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1134.

national security interests of the United States.”⁹² The President could renew the waiver, if “appropriate,” for periods not to exceed six months.⁹³

Similarly, IFSA allowed for a “Waiver with respect to Persons in Countries that Cooperate in Multilateral Efforts with Respect to Iran.”⁹⁴ In particular, on a case by case basis for up to twelve months, the President could waive imposition of sanctions on a person if the government with primary jurisdiction over that person was “closely cooperating” with America in its efforts to keep Iran from acquiring WMDs or destabilizing numbers and types of advanced conventional weaponry. Such a waiver was “vital to the national security interests” of the United States. The President could renew this waiver, if “appropriate,” for periods not to exceed twelve months.⁹⁵

As for strengthening of the sanctions, first, IFSA created the possibility for the President to launch an investigation into imposing sanctions against a person involved in petroleum investment activity in Iran. If he did invoke such an investigation, which he would upon receipt of “credible information indicating” the person was engaged in a sanctionable activity, then the results of the investigation would be due in 180 days.⁹⁶

Second, IFSA made the termination of sanctions more difficult: it added as a third criterion for termination of trade sanctions that (based on Presidential certification to the appropriate Congressional committees) Iran pose “no significant threat” to the national security or interests of the United States or its allies.⁹⁷ Israel – though it is the only country in the Middle East not a signatory to the NPT, and reputed to be the only nuclear-armed power in that region – could claim both an alliance with the United States and a threat to its security or interests.

Indeed, it did so again after President Obama spoke by telephone with Iranian President Hassan Rouhani (1948–). Their fifteen-minute discussion on September 27, 2013 was the first direct communication between the leaders of the two countries since before the fall of the Shah of Iran.⁹⁸ Fearing a possible rapprochement between Washington and Tehran on issues of WMDs and

⁹² *Id.* § 4(c)(1)(A), reprinted in OVERVIEW, PART II, *supra* note 19, at 1134. The President must make this certification at least 30 days before the waiver takes effect. *Id.* § 4(c)(1)(A), reprinted in OVERVIEW PART II, *supra* note 19, at 1134.

⁹³ *See id.* § 4(c)(2)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1134-35.

⁹⁴ *See id.* § 4(c)(1)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1134. As with the general waiver, with the waiver for a person from a cooperating country, the President must make this certification at least thirty days before the waiver takes effect. *See id.* § 4(c)(1)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1134.

⁹⁵ *See id.* § 4(c)(2)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1134-35.

⁹⁶ *See* OVERVIEW, PART I, *supra* note 4, at 275; Iran Sanctions Act of 1996 § 4(e)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1135.

⁹⁷ *See* OVERVIEW, PART I, *supra* note 4, at 275; Iran Sanctions Act of 1996 § 8(3), reprinted in OVERVIEW, PART II, *supra* note 19, at 1144.

⁹⁸ *See* Saeed Kamali Dehghan, *Obama and Rouhani’s Telephone Call of Huge Significance, Says Iranian Deputy*, GUARDIAN (Oct. 2, 2013), <http://www.theguardian.com/world/2013/oct/02/obama-rouhani-phone-call-us-iran>.

terrorism that could involve loosening or eliminating sanctions, Israeli Prime Minister Benjamin Netanyahu (1949–) flew to the American capital, and met with President Obama just three days after his historic phone call with President Rouhani. That the Iranian President had the backing of the Iranian Supreme Leader, *Āyatollāh* Ali Khamenei, who authorized his team to show “heroic flexibility,” surely worried Prime Minister Netanyahu.⁹⁹ The Israeli leader dubbed stopping the Iranian nuclear program the “defining issue of his premiership” and demanded that Iran “stop all uranium enrichment, close the enrichment facility at Qom, remove all enriched uranium, and halt its development of plutonium.”¹⁰⁰

True enough, by the account of President Rouhani in his September 2013 address to the United Nations General Assembly, Iranian “nuclear technology has already reached industrial scale.”¹⁰¹ Its program included roughly 18,000 centrifuges across multiple uranium enrichment sites and stockpiles of enriched uranium to various degrees.¹⁰² But, Israeli demands set a considerably higher threshold for termination of sanctions: without enriching uranium at all, Iran could not have even a peaceful nuclear energy program. Denying Iran such a program, however, never was the aim of the American sanctions.

Prime Minister Netanyahu continued his counter-offensive against what he sarcastically called “sweet talk and the onslaught of smiles” from Iran surrounding the September 2013 United Nations General Assembly meeting.¹⁰³ The Israeli delegation at the United Nations walked out of President Rouhani’s September 2013 speech, making Israel – in the words of Yair Lapid (1963–), the Israeli Finance Minister – look like a “serial objector to negotiations.” And, so it was. The Israeli Prime Minister used his time at the General Assembly podium to launch an *ad hominem* attack on the Iranian President, calling him a “wolf in sheep’s clothing.”¹⁰⁴ Surely, the charm offensive from Tehran was a devilishly clever plot to buy Iran time to enrich more plutonium over the 85 percent threshold needed for a nuclear device. In sum, the third criterion for termination of sanctions added by IFSA nearly sub-contracted American policy on Iran to Israel. As a practical matter, given the overwhelming influence of Israel through the American Israel Political Action Committee (AIPAC) in Congress, it would be

⁹⁹ Quoted in Najmeh Bozorgmehr, *Rouhani Lifts Hope for Solutions*, FIN. TIMES, Sept. 30, 2013, at 4.

¹⁰⁰ John Reed & Geoff Dyer, *Netanyahu to Talk Tough on Iran to Obama*, FIN. TIMES, Sept. 30, 2013, at 4.

¹⁰¹ Quoted in Richard Haass, *A Diplomatic Dance Will Be No Waltz for Either Iran or America*, FIN. TIMES, Sept. 30, 2013, at 11.

¹⁰² See *id.* In December 2013, Iran was estimated to have 19,000 centrifuges. See Geoff Dyer & John Reed, *Israel Opts to Shift Tactics on Iran Talks*, FIN. TIMES, Dec. 7-8, 2013, at 4.

¹⁰³ Reed & Dyer, *supra* note 100.

¹⁰⁴ Quoted in Geoff Dyer, *Iran’s “Good Cop, Bad Cop” Breeds Divided Feelings in Washington*, FIN. TIMES, Dec. 12, 2013, at 12.

difficult to get sanctions lifted without Israeli support – and that support looked well nigh impossible.¹⁰⁵

Third, and most importantly in respect of strengthening the sanctions, IFSA clarified the sanctions regime applies to any “person,” not just any “foreign person.” By “person,” the legislation means:

- (i) [A] natural person;
- (ii) [A] corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other non-governmental entity, organization, or group, and any governmental entity operating as a business enterprise; and
- (iii) [A]ny successor to any entity described in clause (ii).¹⁰⁶

Crucially, the term includes any kind of financial institution or provider of financial services. This inclusion facilitated yet tighter prohibitions and tougher sanctions ushered in 2010, 2012, and 2013 (discussed below).

The only explicit exclusion from the term “person” was a government or governmental entity that did not operate as a business enterprise.¹⁰⁷ So, to the extent the Iranian Revolutionary Guard Corps ran a business, they were within the scope of the sanctions – an understandable inclusion. So, too, was a Chinese SOE, or an Australian STE, or for that matter – and arguably less understandably – the Canadian Wheat Board, or the Indian Coffee Marketing Board.

So IFSA expanded the universe of potential sanctions targets, and this expansion applied to both prohibitions. No longer were foreign persons investing in the Iranian petroleum sector the only targets. Now, any person materially contributing to the ability of Iran to develop a WMD, or even “advanced conventional weapons in destabilizing numbers and types,” was a target.¹⁰⁸ Indeed, sanctions were mandatory against such a person.

As for the terms “United States person” and “foreign person,” they remained in the sanctions statute.¹⁰⁹ This distinction was drawn in terms of the nationality of an individual or the place of organization of a business. A “United States person” was a (1) natural person who is an American citizen, or who owed “permanent allegiance to the United States” (presumably, a holder of a permanent residency or green card), or (2) a legal person, that is, a corporation or other legal

¹⁰⁵ Reed & Dyer, *supra* note 100.

¹⁰⁶ See Iran Sanctions Act of 1996 § 14(14)(A), 50 U.S.C. § 1701 note, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1149.

¹⁰⁷ See *id.* § 14(14)(B), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1149.

¹⁰⁸ See OVERVIEW, PART I, *supra* note 4, at 275.

¹⁰⁹ See Iran Sanctions Act of 1996 § 14(7), (18), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1148-49 (defining “foreign person” and “United States person,” respectively).

entity organized under Federal or State law, if over 50 percent of the capital stock or beneficial interest in the capital stock was owned (directly or indirectly) by an American citizen or green card holder.¹¹⁰ A “foreign person” was a foreign citizen who does not hold a United States permanent residency or green card, or a corporation, partnership, or NGO that is not a “United States person.”¹¹¹ So, for example, a subsidiary corporation incorporated in Kansas, the majority of the shares of which were held by one or more foreign persons (such as an Indian parent company), was a foreign, not a United States, person.

But, was there much practical difference in this distinction? No, because the sanctions apply equally to both types of persons. Simply put, by switching to the term “person,” the United States made clear anyone anywhere was a potential target. Once sanctions were imposed, the person on whom or which they were imposed was dubbed – as before – a “sanctioned person” (sometimes called a “sanctioned entity”).¹¹² The punishments applied to (1) any successor entity, (2) any person owning or controlling the sanctioned entity with “actual knowledge or [that] should have known” of the illegal activities of the sanctioned person, and (3) any person owned or controlled by, or under common control with, the sanctioned person, if that person “knowingly engaged” in the illegal activities.¹¹³

What principles of Public International Law jurisdiction justified the switch from “foreign person” to “person”? While the question is beyond the present scope, a brief digression is worthwhile. Manifestly, neither nationality nor territoriality principles did: the sanctions did not apply only to “United States persons” or acts on American soil.

The rationale would have to lie in the “acts outside, effects inside” standard, whereby an action in support of Iran occurring outside American territory had effects inside the United States. What might those effects be? If Iran acquired a WMD, then it could threaten the national security of the United States, or even launch an attack on it or its overseas posts (such as embassies and military bases) and nationals (both civilian and military).

¹¹⁰ See *id.* § 14(18), reprinted in OVERVIEW, PART II, *supra* note 19, at 1149 (defining “United States person”).

¹¹¹ See *id.* § 14(7), reprinted in OVERVIEW, PART II, *supra* note 19, at 1148 (defining “foreign person”).

¹¹² See *id.* § 5(c), reprinted in OVERVIEW, PART II, *supra* note 19, at 1139. Such persons are identified in the Federal Register, as is a list of all significant oil and gas projects that Iran has put for public tender. See *id.* § 5(d)-(e), reprinted in OVERVIEW, PART II, *supra* note 19, at 1139-40.

¹¹³ See *id.* § 5(c)(2), reprinted in OVERVIEW, PART II, *supra* note 19, at 1139 (defining “sanctioned person”).

VII. PHASE 7: 2010 CISADA EMPHASES ON TRADE EMBARGO, REFINED GASOLINE, ASSET FREEZES, AND HUMAN RIGHTS

A. Getting Tougher with Eight New Measures (July 1 Through December 31, 2016)

The 111th Congress enacted the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.¹¹⁴ The legislation extended sanctions through December 31, 2016.¹¹⁵ This six-year extension of the ISA contrasted with the five-year extension by the Extension Act (2001-2006), and the five-year extension by the IFSA (2006-2011). CISADA “expanded significantly” the original ILSA sanctions.¹¹⁶ Having crossed the Rubicon with ILSA in 1996, The United States, with CISADA enacted, pushed more aggressively in 2010 than ever before, broadening and deepening its unilateral prohibitions and punishments.

By no means did the United States abandon multilateral efforts. Indeed, CISADA expressed a preference for multilateral over unilateral measures to compel behavioral change in Iran.¹¹⁷ The problem was multilateral sanctions were not causing that change. So, America had to lead a “get tougher” approach. Eight new measures defined its push.

Notably, America reaffirmed its justifications for its rules against Iran through the termination criteria, or Sunset Rule, in CISADA. This Rule stated:

The provisions of this Act (other than sections 105 and 305 [22 U.S.C. §§ 8514 and 8544, concerning the human rights abuse prohibition, discussed below, and enforcement authority, respectively] and the amendments made by sections 102, 107, 109, and 205 [concerning expansion of ISA sanctions, harmonization of criminal penalties, capacity to combat terrorist financing, and technical corrections to sanctions rules against Sudan]) shall terminate, and section 80a-13(c)(1)(B) of title 15 [concerning changes in investment policy by registered investment companies], as added by section 203(a), shall cease to be effective, on the date that is 30 days after the date on

¹¹⁴ See Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, 124 Stat. 1312-51 (enacted July 1, 2010), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214, Iran Freedom and Counter-Proliferation Act of 2012, Pub. L. 112-239, 126 Stat. 1632, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013 (codified at 22 U.S.C. §§ 8501 note, 8512, 8513a, 8514, 8514a, 8514b & 50 U.S.C. § 1701 note); *see also* 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, *reprinted in* 2013 COMPILATION, *supra* note 11, at 708-21.

¹¹⁵ See Iran Sanctions Act of 1996 §13(b), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1147.

¹¹⁶ See OVERVIEW, PART I, *supra* note 4, at 275.

¹¹⁷ See CISADA § 114(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 717.

which the President certifies to Congress that –

- (1) [T]he Government of Iran has *ceased providing support for acts of international terrorism* and no longer satisfies the requirements for designation as a state sponsor of terrorism (as defined in section 301 [22 U.S.C. Section 8541] . . . and
- (2) Iran has *ceased the pursuit, acquisition, and development of, and verifiably dismantled its, nuclear, biological, and chemical weapons* and ballistic missiles and ballistic missile launch technology.¹¹⁸

Thus, CISADA terminated when the long-standing goals of the United States to change Iranian behavior on WMDs and terrorism nuclear weaponry were met.

B. Measures 1 and 2: Import and Export Prohibitions

The first two measures constituted a total trade embargo on Iran. First, the United States banned importation from Iran.¹¹⁹ That ban covered direct or indirect importation of goods or services.¹²⁰ Consequently, buying saffron harvested in Iran, but selling it in a market in Sharjah, and bringing it into the United States, was illegal. There were precious few exceptions, namely, those allowed under the IEEPA, and for information or informational materials.¹²¹

Note the import ban applied to products of “Iranian origin.” CISADA did not specify what rules of origin (ROO) should be used to determine whether a product indeed came from Iran. The example of saffron is an easy case of the well-known grown and harvested ROO: a product grown and harvested in a particular country is the product of that country, even if the seeds planted or fertilizer used came from another country, or the water for the crop was irrigated from another country. A harder case could be woven from the famed Iranian carpet industry. Suppose silk for a carpet comes from India, the design is the

¹¹⁸ *Id.* § 401(a) (codified at 22 U.S.C. § 8551(a)) (emphasis added).

¹¹⁹ *Id.* § 103(a), *reprinted in* 2013 COMPILATION, *supra* note 11, at 708-09.

¹²⁰ It appeared that the addition of services to the import ban was the result of an amendment by the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-81, 125 Stat. 1298, Iran Freedom and Counter-Proliferation Act of 2012, Pub. L. 112-239, 126 Stat. 1632, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, *reprinted in* 2013 COMPILATION, *supra* note 11, at 721-36. Note that unlike the export ban (discussed below), the import ban did not apply to technology, i.e., Iranian technology could be imported into the United States, but American technology could not be exported to Iran.

¹²¹ See CISADA § 103(b)(1)(B), *reprinted in* 2013 COMPILATION, *supra*, at 708-09; OVERVIEW, PART I, *supra* note 4, at 275. The IEEPA exceptions are set out at 50 U.S.C. § 1702(b).

lovely Qom style, weaving occurs in Iran, and brushing, cleaning, and finishing occurs in Turkey. Is the carpet “Iranian” based on the place in which it is woven?

The question may be even trickier with respect to services, for which there are no clear ROOs. Imagine a film crew consisting of Iranian and non-Iranian nationals, based in Tehran, seeking to make a movie about a family that migrated from Shiraz to Kansas City just before the fall of the Shah in 1979. The movie is a co-production with a Hollywood studio. Services are provided through various modes: via the internet (cross-border supply, i.e., Mode I), travel by Iranian-American actors portraying the family members from the United States to Iran (consumption abroad, i.e., Mode II), and the joint venture (JV) with the Hollywood studio (foreign direct investment, i.e., Mode III). Are these services “from” Iran, and thus barred?

Relatedly, CISADA required the President to report annually to the appropriate Congressional committees on global trade relating to Iran.¹²² In particular, he was supposed to identify the dollar value amount of trade between Iran and each country holding membership in the Group of 20 (G-20) Finance Ministers and Central Bank Governors. Plainly, the requirement was designed to give the United States data to use to pressure its G-20 partners not to export to or import from Iran. Such data, for instance, not only could identify the “outlaw” G-20 countries, but also highlights the relevant merchandise, for which (presumably) the United States could assist in finding alternative markets or sources. In turn, G-20 Finance Ministers and Central Bank officials could work to block trade financing and payments transactions.

Second, by closing various loopholes, CISADA barred essentially all exports from the United States to Iran. All exports from the United States, whether goods, services, or technology, including those of or containing Iranian-originating merchandise, and including luxury items (e.g., Persian carpets or processed pistachios), were illegal.¹²³ Notably, the ban applied to exports from the United States, or from a “United States person, wherever located.”¹²⁴ In other words, a foreign citizen shipping to Iran from Kansas City, or a Kansas citizen residing in Dubai shipping to Iran, would run afoul of the ban.

The only exceptions to the export ban were for: (1) personal communications, (2) informational material, (3) transactions incident to travel, (4) services for Internet communications, (5) agricultural commodities (i.e., food), (6)

¹²² See Iran Sanctions Act of 1996 § 10(d), 50 U.S.C. § 1701 note, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1146.

¹²³ See CISADA § 103(a), (b)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 708-09. Note there had been a ban on exports, and CISADA introduced the exemption for Internet communications, or exports of goods or services, to help support democracy in Iran. See OVERVIEW, PART I, *supra* note 4, at 275. It appeared the addition of services to the import ban was the result of an amendment by the Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 721-36.

¹²⁴ See CISADA § 103(b)(2)(A), *reprinted in* 2013 COMPILATION, *supra* note 11, at 709; Iran Sanctions Act of 1996 § 14(18), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1149-50.

medicine or medical devices, (7) humanitarian assistance and/or articles to relieve human suffering, (8) goods, services, or technology necessary to ensure the safe operation of commercial aircraft made in the United States (e.g., components for Boeing aircraft used by Iran Air), with the approval of the Treasury Secretary in consultation with the Commerce Secretary, (9) goods, services, or technology to support the International Atomic Energy Agency (IAEA) for its work in Iran or international or non-governmental organizations (NGOs) in their efforts to build democracy in Iran, and (10) exports in the national interest of the United States.¹²⁵

As the tenth category intimated, the exceptions advanced the goals underlying the sanctions by facilitating political change in Iran. Leaflets, Twitter and Facebook accounts, and NGOs all could help in this regard. So, for example, under exceptions (1) and (2), a law professor at the University of Kansas could respond to an email from a prospective law student in Iran about degree programs at the university, and also honor a request from that student, or a researcher, to email a PDF copy of a previously published, publicly available, law journal article. Arguably, educating Iranians in the American legal system also is in the national interest of the United States (item (10)).

C. Measures 3, 4, and 5: Refined Gasoline Prohibitions

The third, fourth, and fifth measures were mutually reinforcing and reflected a broadening of the type of sanctionable activity. No longer was investment in the Iranian petroleum sector the only forbidden activity. With CISADA, the refined gasoline sector also was off limits. America sought to deny Iran not only the ability to find and extract crude oil, but also to refine that oil into gasoline or to import gasoline.

So, the third new measure made illegal any “knowing” transaction by any “person” that would assist Iran in producing refined petroleum products.¹²⁶ Supplying equipment to, or helping to construct, oil refineries in Iran became forbidden. The sale, lease, or provision to Iran of “goods, services, technology, information, or support” that “could directly and significantly facilitate the maintenance or expansion of Iran’s domestic production of refined petroleum products, including any direct and significant assistance . . . [for] the construction, modernization, or repair of petroleum refineries” was illegal.¹²⁷ By barring Iran from expanding its refining capacity, another potential source of export revenues – and thus of funds for WMDs or terrorist activities – would be closed off.

Like the original 1996 ILSA bar on investment in the Iranian petroleum sector, which had a U.S. \$40 million threshold that the 2001 Extension Act

¹²⁵ See CISADA § 103(b)(2)(B)(i)-(vi), reprinted in 2013 COMPILATION, *supra* note 11, at 709; OVERVIEW, PART I, *supra* note 4, at 275.

¹²⁶ See Iran Sanctions Act of 1996 § 5(a), reprinted in OVERVIEW, PART II, *supra* note 19, at 1136.

¹²⁷ See *id.* § 5(a)(2)(A)-(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1136.

reduced to U.S. \$20 million, the CISADA measure had a threshold of U.S. \$1 million. Any sale, lease, or provision of a good, service, technology, information, or support with a fair market value (FMV) of U.S. \$1 million or more (or, to prevent structuring, multiple items aggregating to a FMV of U.S. \$5 million or more in one year) was illegal.¹²⁸ The market in which “fair value” was to be tested was unclear: Iran? United States? A third country? The world market?

Interestingly, the problem of the relevant market is one that occurs in WTO subsidies jurisprudence, when a panel or the Appellate Body needs to decide whether a challenged measure confers a benefit on a recipient. The test typically is to measure the support against a market-based benchmark, but deciding on the correct market can be controversial – as the arguments between the United States and Brazil in the famous 2005 *Cotton* case bespeak.

This CISADA change bore the same ambiguity as did the initial ILSA legislation in 1996 forbidding “direct and significant” investments to help Iran with its petroleum resources: what kind of transaction “could directly and significantly” help it with gasoline refining? But, the change introduced a new strategic ambiguity by virtue of one word: “could.” The pertinent verbs in the initial legislation were “directly and significantly contributes,” which demands proof an investment does, in fact, achieve the end of assisting Iran. In CISADA, the relevant verbs were “could directly and significantly facilitate.” No proof was required; speculation as to what Iran might be able to do with the goods, services, technology, information, or support is enough.

That ambiguity surely allowed for aggressive American enforcement. Recall the above hypothetical about supplying Iran with buttons, shoelaces, bottled water, prescription eyeglasses, and aspirin. It remains apposite, indeed, even more so than before CISADA. That is because selling U.S. \$20 million worth of such merchandise is a high value threshold to meet, but selling U.S. \$1 million is not. It also is because any such items “could” constitute direct, significant, facilitation.

Foreseeably, if the third measure worked and Iran could not refine crude oil into gasoline, then it would look for a substitute: importation. The fourth new measure anticipated and sought to block this move: CISADA barred sale of refined gasoline to Iran. With a view to constrict export revenues that Iran could use to acquire WMDs or support terrorism, ILSA had long made it illegal to buy petroleum from Iran. Now, CISADA also forbid selling gas to Iran. Iran (redolent of Nigeria) has substantial petroleum reserves, but with little refining capacity, it must import gas for domestic consumption. CISADA would choke off those imports, forcing up gas prices in Iran. In turn, Iranians might pressure their government to comply with American demands for international inspections of nuclear facilities, and abjuring WMDs and terrorists. It might even lead to a change in the government of Iran.

¹²⁸ See *id.* § 55(a)(2)(A)(i)-(ii), reprinted in OVERVIEW, PART II, *supra* note 19, at 1136.

So, in legal terms, CISADA forbade exportation of refined petroleum products to Iran. No person could sell or otherwise provide Iran with them.¹²⁹ Likewise, helping Iran upgrade its capacity to import these products was illegal: no person could “sell[], lease[], or provide[] to Iran goods, services, technology, information, or support . . . that could directly and significantly contribute to the enhancement of Iran’s ability to import refined petroleum products.”¹³⁰ Again, the valuation thresholds were U.S. \$1 million in FMV terms (or U.S. \$5 million in annual aggregate FMV), with no guidance on where or how to calculate FMV.¹³¹ Again, speculation was enough – what “could” happen is what mattered. And, again, the *mens rea* requirement, “knowingly,” could be met with actual or constructive knowledge. In brief, by expanding prohibited engagement from the export to the import sector, the rule deliberately sought to weaken, if not wreck, the Iranian economy.

As for the fifth measure, consider again the hypothetical example concerning buttons, shoelaces, bottled water, prescription eyeglasses, and aspirin, as well as insurance, financial, and shipping services. Suppose a Russian trading house in Vladivostok brokers a transaction, denominated in Indian *rupees*, between a supplier and an importer in Iran. The deal is a contract for refined petroleum (or, alternatively, for the sale, lease, or provision of goods, services, technology, information, or support that could substantially help Iran import gasoline). Siam Bank in Bangkok issues a commercial letter of credit (L/C) on behalf of the importer. The importer pays the supplier via the L/C when appropriate and conforming documents, as called for under the terms of the L/C, are presented to its bank, the Bank of Baroda, in Bombay. The documents are couriered between the banks, from Bombay to Bangkok, by DHL. Lloyd’s of London underwrites an insurance or reinsurance contract for this transaction. Finally, suppose the Danish freight company, Maersk, provides a Liberian-flagged tanker to carry the refined oil from Busan, South Korea, via Singapore, to Bandar Abbas, Iran.

What parties in the above hypothetical transaction are potentially liable for violating the ban on exporting refined petroleum products to Iran? The answer is “everybody.” Brokering and financing a deal is a sanctionable act, rendering the Russian trading house and Siam Bank liable.¹³² Providing ships and shipping services are forbidden, rendering Maersk liable, and possibly also DHL, if “shipping services” includes air courier (thus making DHL, a “courier,” a “shipper”), and “support” covers transmission of L/C documents.¹³³ Underwriting insurance or reinsurance contracts is forbidden, putting Lloyd’s in legal peril.¹³⁴

¹²⁹ See *id.* § 5(a)(3)(A)(i), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

¹³⁰ See *id.* § 5(a)(3)(A)(ii)-(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

¹³¹ See Iran Sanctions Act of 1996 § 5(a)(3)(A)(i)-(ii), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

¹³² See *id.* § 5(a)(3)(B)(ii), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

¹³³ See *id.* § 5(a)(3)(B)(ii), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

¹³⁴ See *id.* § 5(a)(3)(B)(i), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

Simply put, the fifth CISADA measure created a new sanctionable prohibition: shipping and insurance services.

Consider an alteration to the hypothetical: instead of using the formal banking and payments system, the Russian trading house arranges a barter trade. Indian Oil will import crude oil from Iran and pay Iran for it with Basmati rice. Refined petroleum is not involved in the transaction, nor is any merchandise, or any services, used to build a refinery. There is no liability under the original ILSA for the sanctionable act of investing U.S. \$20 million in the Iranian petroleum sector. Indian Oil made no such investment, and the barter deal was not worth such a high figure. Is there liability under the CISADA measures for exporting refined petroleum products to Iran or helping it to produce them?

Arguably, yes. Iranian workers whose job it is to build a refinery or upgrade seaport facilities might eat the Indian rice and thereby ingest the carbohydrates they need to work. Moreover, by paying for the rice with crude oil, Iran does not incur the opportunity cost of using precious hard currency. That saving “could directly and significantly contribute” to Iran’s ability to import gasoline.¹³⁵ Iran could use that hard currency to import materials to build a new or repair an existing refinery, or for gasoline, which in both cases would be overt sanctions violations.

The hypothetical and its alteration manifest how broad ILSA became thanks to the fifth CISADA measure. CISADA barred shipping, insurance, and related services that might help Iran import gasoline: not only was it illegal to sell gasoline to Iran, but it was also unlawful to facilitate gasoline importation to Iran by insuring vessels or other transport modes for that gasoline.

“Ubiquitous” might be an overstatement, as the amended sanctions did not invariably apply to every transaction involving Iran. For example, CISADA offered a safe harbor for underwriters and insurers. If they:

[E]xercised due diligence in establishing and enforcing official policies, procedures, and controls to ensure that the person [did] not underwrite or enter into a contract to provide insurance or reinsurance for the sale, lease, or provision of goods, services, technology, or information [that could help Iran improve its ability to import refined petroleum products,]

then they were exempt from sanctions.¹³⁶ Still, with CISADA, American trade sanctions against Iran rightly could be characterized as a “brooding global omnipresence,” casting a shadow of caution, if not doubt, on nearly all dealings with Iran.

In brief, by supplementing the trade embargo of the first two measures, the third, fourth, and fifth measures suggest “CISADA” might have been more

¹³⁵ See *id.* § 5(a)(3)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

¹³⁶ See Iran Sanctions Act of 1996 § 5(a)(3)(C), reprinted in OVERVIEW, PART II, *supra* note 19, at 1137.

succinctly and accurately labeled the “Trade Embargo and No Gasoline for Iran Act” (TENGIA). American rules denied Iran the ability to refine crude oil into or to import petroleum products.

From an American perspective, a TENGIA seemed logical: Iran had plenty of petroleum (albeit unrefined), so why should it need nuclear power as an energy source? If Iran insisted on developing nuclear power, and concomitantly nuclear weapons, then surely America was right to choke off a potential source of support funds for that development, namely, refined gasoline. But from an Iranian perspective, opportunity cost was the rationale for developing its petroleum and refined gasoline sectors, plus peaceful nuclear energy.

Suppose Iran consumed all its petroleum domestically, and shipped any surplus overseas. By the time it exhausted this natural resource, would it have diversified its economic and export base? Or would peaceful nuclear energy have allowed allow Iran to stretch out the period before it exhausted its precious natural resource, and in that extra time allowed it to nurture broad-based industrial and service sector development? Put differently, might energy diversification help Iran avoid the resource curse afflicting so many other countries in the Organization of Petroleum Exporting Countries (OPEC)?

Such questions suggest the opportunity cost for Iran of not developing a nuclear energy program was time for prudent diversification beyond oil dependency. Pursuing that alternative energy source could avoid the opportunity cost of a faster run down of its petroleum reserves, giving it more time for a major, successful structural adjustment. All that could occur, of course, without pursuing a WMD or supporting terrorism. Indeed, diverting funds for those activities would inhibit Iran from avoiding this opportunity cost.

D. Measure 6: Asset Freeze Prohibition

The sixth measure took the form of another prohibition, namely, violation of an asset freeze.¹³⁷ Any funds or other assets belonging to a person in Iran that satisfied the criteria for sanctions under the IEEPA were blocked via Presidential order. Those persons included governmental and quasi-governmental officials, and individuals connected with the Iranian military, Revolutionary Guard Corps, or their affiliates. Transfers of funds or assets to their family members were forbidden. Any American financial institution holding such funds or assets was required to report those holdings to the Office of Foreign Assets Control (OFAC) of the Department of the Treasury, and the President was obliged to report to appropriate Congressional committees on the persons subject to these

¹³⁷ CISADA § 103(b)(3)(A), (D), 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, *reprinted in* 2013 COMPILATION, *supra* note 11, at 710-11.

freeze orders.¹³⁸ Penalties for violation of any asset freeze order were the same as those for all others.¹³⁹

Why did the statute expressly mention the Revolutionary Guards? Congress explained its sense that America should “persistently target” economic sanctions against the Guards because of “its support for terrorism, its role in proliferation, and its oppressive activities against the people of Iran.”¹⁴⁰ That was because, according to Congress, the Guards were the locus among hardliners pursuing the most vehemently anti-American policies, and the principal instrument for crushing the Green Revolution (as discussed below). Hence, Congress sought to force the hand of the President: he was to impose sanctions on individual Guard officials, such as travel restrictions or other punishments available to him via the 1996 Iran Sanctions Act, as amended in the 2010 CISADA, and under the IEEPA.¹⁴¹

Most obviously, then, the asset freeze prevented Iranian officials from taking money out of American banks to assist their country in obtaining a WMD or supporting terrorism. A less obvious consequence was they could not as easily shop for designer brand items at luxury stores like Harrods in London or Chanel in Paris. That consequence may seem insignificant. Yet, as the examples of some North Korean and Syrian government officials indicate, elites enjoy shopping regardless of the plight of their country or fellow nationals. Circumscribing what they regard as a personal entitlement potentially “hits” them in a poignant manner.

E. Measure 7: Human Rights Prohibition

The seventh measure represented a policy addition to the American sanctions regime: two more types of behavior became illegal, but they did not involve the energy sector of Iran. For the first time, America took aim at human rights abuses and press censorship in Iran, declaring them to be punishable under the regime. The goal of the regime thereby expanded from preventing Iran from acquiring WMDs and disrupting its support for terrorism, to deterring it from committing human rights abuses or censorship.

Why bother to seek even more behavioral modification in Iran? The repression of pro-democracy movement by Iranian authorities and their thuggish proxies in the Green Revolution certainly was one reason. That violence, splashed across the world’s media, was too monstrous to ignore; if the *Āyatollāhs* and their minions were “evil” for pursuing nuclear weapons and supporting terrorists, then surely they were condemnable for crushing street protests.

So, the President was obliged to identify and update the appropriate Congressional committees on officials of the Iranian government, or their agents,

¹³⁸ See *id.* § 103(b)(3)(B)-(C), reprinted in 2013 COMPILATION, *supra* note 11, at 710-11.

¹³⁹ See *id.* § 103(c), reprinted in 2013 COMPILATION, *supra* note 11, at 711.

¹⁴⁰ See *id.* § 112(1), reprinted in 2013 COMPILATION, *supra* note 11, at 716.

¹⁴¹ See *id.* § 112(3), reprinted in 2013 COMPILATION, *supra* note 11, at 716.

including *Hezbollah* and the *Basij-e* militia, which were responsible for, or complicit in, “serious human rights abuses” against Iranians, wherever located.¹⁴² (That Congress thought America should strike hard at these officials for their support of *Hezbollah*, which posed an overt threat to Israel, as well as Lebanon and the United States, was clear from its declared sense.¹⁴³) “Credible evidence,” which could include announcements or information about the activities of a person by a “reputable” public or private sector entity, or by a foreign government (e.g., Israeli intelligence services), or non-governmental organization (e.g., Amnesty International), was needed to support this blacklisting.¹⁴⁴

Because this prohibition targeted individuals, the sanctions the President was required to impose differed from the normal menu. They were targeted at the individuals namely through denying visas to enter the United States (save for an appearance at the United Nations Headquarters in New York), blocking personal property or its importation or exportation (assuming it was within reach of American authorities), and barring financial transactions (assuming American authorities could identify and stop them). Such punishments could be lifted only when Iran meets four requirements: (1) unconditionally release “all political prisoners”; (2) cease “violence, unlawful detention, torture, and abuse” against Iranians engaged in “peaceful political activity”; (3) conduct a “transparent investigation” of the repression of political activists following the Green Revolution; and (4) make “demonstrable progress” towards an “independent judiciary” and implementing the Universal Declaration of Human Rights.¹⁴⁵

F. Measure 8: Expanded and Increased Sanctions

As for the eighth measure, the 2010 legislation expanded the ILSA list of sanctions from six to nine and increased the number of sanctions the President had to impose from at least two to three.¹⁴⁶ The new sanctions on the President’s menu, all prohibitions, were (numbering consecutively from ILSA):

¹⁴² See CISADA § 105(a)-(b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 711-12.

¹⁴³ See *id.* § 113(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 716.

¹⁴⁴ See *id.* § 105(b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 711; Iran Sanctions Act of 1996 § 14(4), 50 U.S.C. § 1701 note, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 705 (defining “credible information”).

¹⁴⁵ See CISADA § 105(c)-(d), *reprinted in* 2013 COMPILATION, *supra* note 11, at 712-13.

¹⁴⁶ See Iran Sanctions Act of 1996 §§ 5(a)(1)(A) (mandating the President impose three or more sanctions for a violation of the Petroleum Resource Development Prohibition), 5(a)(2)(A) (mandating the President impose three or more sanctions for violation of the Refined Petroleum Production Prohibition), 5(a)(3)(A) (mandating three or more sanctions for violations of the Refined Petroleum Export Sanction), 5(a)(b) (mandating the President impose three or more sanctions for the Sensitive Weapons Export Prohibition), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135-38.

(7) Foreign Exchange Sanction:¹⁴⁷

Any foreign exchange (FX) transaction with a sanctioned person was forbidden. That party could be barred from any foreign exchange transactions over which the United States claims jurisdiction and in which that entity had an interest.

That might mean the United States did not claim jurisdiction over all dollar transactions under a *lex monétaire* (i.e., a theory of the law of the currency), so the sanctioned entity might be able to enter into certain FX deals in offshore dollars not involving United States financial institutions. But, if the transaction cleared or settled through the United States payments system, such as Fedwire or CHIPS (the New York Clearing House Interbank Payments System), or involved an American financial institution, then it could be blocked.¹⁴⁸

An obvious example, coupled with the Property Transaction sanction (below) would be where a sanctioned entity from Yemen sought to sell financial assets or real property in the United States, convert the proceeds from dollars to Yemeni *rial*, and repatriate those funds to Yemen. Both the sale and the FX conversion could be blocked.

(8) Inter-bank Transactions Sanction:¹⁴⁹

Any transfer of credit to, or payment transaction, with a sanctioned entity, by, through, or between any “financial institutions” was barred.¹⁵⁰ That is, to the extent a transfer or payment is subject to the jurisdiction of the United States and involves any interest of a sanctioned person, it may be blocked.

¹⁴⁷ See *id.* § 6(a)(6), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

¹⁴⁸ See Delphine Strauss, *America’s “Exorbitant Privilege” Is Ebbing*, FIN. TIMES, Jan. 27, 2014, at 8 (reviewing THE POWER OF CURRENCIES AND CURRENCIES OF POWER (Alan Wheatley ed., 2013) and correctly stating “because payment in dollars ultimately involves a transfer on the books of the Federal Reserve, the United States can enforce a financial blockade”).

¹⁴⁹ See Iran Sanctions Act of 1996 § 6(a)(7), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

¹⁵⁰ See *id.* § 14(5), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147. Again, the statute incorporates by reference the definition of “financial institution” from section 3(c)(1) of the Federal Deposit Insurance Act of 1950, and the definition of a foreign bank “branch” or “agency” from section 1(b)(7) of the International Banking Act of 1978. See *id.* § 14(5), reprinted in OVERVIEW, PART II, *supra* note 19, at 1147.

As with the FX Sanction, the Inter-Bank Transactions Sanction could be interpreted broadly to cover any electronic funds transfer through Fedwire or CHIPS, insofar as movements of funds through these systems involve electronic debit and credit entries on banks located in or subject to the jurisdiction of the United States, including, of course, the Federal Reserve Bank of New York. Unlike the FX Sanction, however, the Inter-Bank Transactions Sanction covered any “financial institution,” i.e., both American and foreign. Thus, for example, a foreign bank branch or agency in the United States was covered (because it operates on American territory), as well as a United States bank overseas (because it is subject to supervision by American bank regulators).

Arguably, so too was a foreign bank branch or agency located overseas, though exactly how far the reach could extend, as a practical matter, was unclear. It was not easy for American authorities to block dollar transfers through every office of every offshore foreign bank, and *a fortiori* for them to do so with respect to transfers in other currencies.

Not surprisingly, that is why Iran had little choice but to substitute dollars for other currencies for payment purposes. This response, whereby Iranians reduced their legal risk of losing funds denominated in dollars, raised a general policy problem created by the purported long-arm reach of the sanction, i.e., it injected legal risk into operating in United States dollars.

Parties, both Iranian and non-Iranian, preferred to transact in other currencies, so as to argue those transactions were not subject to the jurisdiction of the United States. The dollar, then, became a less desirable currency to hold because of the greater legal risk associated with it than with, for instance, Japan’s *yen* or even India’s *rupee*. Similarly, this sanction also created an incentive for barter trade (discussed below), as occurred between Iran and India in respect of petroleum products (from Iran to India) and rice (*vice versa*).

(9) Property Transaction Sanction:¹⁵¹

Any transaction involving property of a sanctioned entity subject to the jurisdiction of the United States was prohibited. In effect, this sanction tied up assets of the sanctioned person. Accordingly, the sanctioned person could be barred from “acquiring, holding, withholding, using, transferring, withdrawing, transporting,

¹⁵¹ See *id.* § 6(a)(8), reprinted in OVERVIEW, PART II, *supra* note 19, at 1141.

importing, or exporting any property,” or “conducting any transaction involving such property” in or otherwise within the reach of the United States in which that person had an interest.¹⁵²

For instance, a sanctioned entity owning an apartment on the Kansas City Country Club Plaza could be barred from staying in it or selling it to a non-sanctioned party. The Property Transaction Sanction extended to “dealing in or exercising any right, power, or privilege with respect to such property.”¹⁵³ Thus, for example, a sanctioned entity could be prohibited from exercising voting rights associated with stock, or exercising rights on a call or put option on a financial instrument. The term “property” was not restricted to tangible items, so the stock or other financial instrument could be un-certificated (electronic book entry) securities.

To continue the hypothetical illustration with Lloyd’s, suppose it underwrites an insurance policy for a vessel owned by Maersk that shipped gasoline to Iran.

Suppose further that the President chooses as the three sanctions on Lloyd’s (7), (8), and (9). It would be illegal to enter into a foreign exchange transaction, such as exchanging Iranian *rial* for Indian *rupees*, or to lend funds to Lloyd’s. If Lloyd’s held property in Kansas City, then it would be unlawful to buy that property, or (interpreting “any transaction” broadly) provide services (such as air conditioning or gardening) to that property. Furthermore, CISADA mandated sanctions for any financial institution that helped a sanctioned entity. So, if Bangkok Bank assists Lloyd’s by acting as a correspondent bank (e.g., holding an account of Lloyd’s through which Lloyd’s made or received payments to or from Maersk), then those banks would be sanctioned.

Two final aspects of CISADA buttressed its aggressive stance: any firm seeking a United States government contract had to certify it was in compliance with ILSA;¹⁵⁴ and any country that the parent country of an entity sanctioned for

¹⁵² See *id.* § 6(a)(8)(A), (C), reprinted in OVERVIEW, PART II, *supra* note 19, at 1142.

¹⁵³ See *id.* § 6(a)(8)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1142.

¹⁵⁴ See Iran Sanctions Act of 1996 § 6(b)(1), reprinted in OVERVIEW, PART II, *supra* note 19, at 1142. Parties excluded from federal procurement are listed in the Federal Acquisitions Register. See *id.* § 6(b)(2)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1142. “Eligible products” from designated “eligible countries” are exempt from the certification requirement. See *id.* § 6(b)(2)(B), reprinted in OVERVIEW, PART II, *supra* note 19, at 1142; Trade Agreements Act of 1979, 19 U.S.C. §§ 2518(4), 2511(b) (defining “eligible products” in section 2518(4) and defining “eligible countries” in section 2511(b)). Essentially, they are products originating in a country in the WTO Agreement on Government Procurement (GPA) (or willing to assume GPA obligations) or North American Free Trade Agreement (NAFTA), a least developed country, a country that will provide reciprocal procurement opportunities for American suppliers, or a country with which the United States has a free trade agreement that took effect after December 31, 2003 and before January 2, 2005, i.e., Australia (effective January 1, 2005), Chile (effective January 1, 2004), and Singapore (also effective January 1, 2004).

providing Iran with WMD technology had to be refused a license of nuclear materials, facilities, or technology.¹⁵⁵

To be sure, CISADA was not all “on the one hand,” i.e., not entirely aggressive. Its “on the other hand” measures were a waiver of any sanctions on “vital national security interest grounds,”¹⁵⁶ and a waiver of the government contract certification obligation on the basis of “the national interest of the United States.”¹⁵⁷ Note the ambiguity created by the lack of a uniform waiver standard: only the first waiver had the adjective “vital.”

Moreover, while CISADA amended IFSA to make mandatory a Presidential investigation, to be completed within 180 days total of potentially sanctionable activity, it also contained a “Special Rule.”¹⁵⁸ So, on the one hand, the President had to initiate an investigation with a view to impose sanctions against any person if the United States received “credible information” that the person had engaged in sanctionable activity. Such activity (as noted earlier), concerns the (1) development of petroleum resources in Iran; (2) production of refined petroleum products in Iran; or (3) exportation of refined petroleum to Iran.¹⁵⁹

On the other hand, there was a Special Rule – literally dubbed that.¹⁶⁰ If a person ceased, or took “significant verifiable steps” to cease, activity that was sanctionable, and if that person provided “reliable assurances” to the President that he or she would “not knowingly engage” in any such activity in the future, then no investigation ensued (or one that has commenced was terminated).¹⁶¹

There remained textual ambiguities. What information was “credible”? What steps were “significant”? How was verification to occur? What assurances are “reliable”? There also remained interpretative problems relating to the scope of application of the sanctions. For example, suppose an air courier company, such as FedEx, transported a package from an exporter in North Korea to Iran. Did it have the same liability as the exporter, or was it an innocent transporter?

¹⁵⁵ See Iran Sanctions Act of 1996 § 5(b)(2)(A), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1138.

¹⁵⁶ See OVERVIEW, PART I, *supra* note 4, at 275.

¹⁵⁷ See Iran Sanctions Act of 1996 § 6(b)(5), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1143.

¹⁵⁸ See *id.* § 4(e), *reprinted in* OVERVIEW, PART II, *supra* note 19 at 1135; OVERVIEW, PART I, *supra* note 4, at 275.

¹⁵⁹ See Iran Sanctions Act of 1996 §§ 4(e)(1), 5(a), *reprinted in* OVERVIEW, PART I, *supra* note 19, at 1135-37.

¹⁶⁰ See *id.* §§ 4(e)(3), 5(a), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135-37. The President invoked the Special Rule by written certification to the appropriate congressional committees.

¹⁶¹ See *id.* § 4(e), *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135.

VIII. PHASE 8: 2012 DEFENSE ACT TIGHTENING FINANCIAL SANCTIONS

A. Targeting Iranian Financial Sector (January 1, 2012 Through December 31, 2016)¹⁶²

The 1996 and 2010 legislation did not establish a comprehensive set of prohibitions and sanctions in respect to the Iranian financial sector. The 2010 changes included new measures against foreign exchange and inter-bank transactions involving a sanctioned person or entity, and dealings with property in the United States of a sanctioned person. But they did not target the Central Bank of Iran (CBI), nor did they address specific concerns of Iranian banks in money laundering or financing WMD proliferation or terrorism.¹⁶³ And they did nothing to help third countries eschew purchases of Iranian crude oil, so as to cut their dependence on it or constrict sale proceeds flowing to Iran that it would use to fund WMD acquisitions or terrorist causes.

After the 2010 legislation, in November 2011, the Financial Crimes Enforcement Network (FINCEN) of the United States Department found that the CBI transferred billions of dollars to the Export Development Bank of Iran (EDBI),¹⁶⁴ Bank Mellat (“Bank of the Nation”),¹⁶⁵ Bank Melli (“National Bank of Iran”),¹⁶⁶ Bank Sadrat Iran (The Export Bank of Iran),¹⁶⁷ and other Iranian banks that the CBI is supposed to regulate.¹⁶⁸ Doing so facilitated evasion of sanctions by reducing the involvement of American and other non-Iranian banks, which were trying to comply with the prohibitions set out in the 1996 and 2010 legislation, with the CBI and Iranian banks. In effect, via schemes to funnel payments to Iranian banks, the CBI covered for the loss of banking relationships they incurred thanks to the pressure of sanctions on American and other international banks to eschew dealings with them.

¹⁶² The implementation dates of certain provisions discussed below varied. For example, the payments system prohibition took effect 60 days after the legislation entered into force, i.e., February 29, 2012, while the provision on applicability of sanctions to foreign central banks other than that of Iran took effect 180 days thereafter, i.e., June 28, 2012. See National Defense Authorization Act for Fiscal Year 2012 § 1245, *reprinted in* 2013 COMPILATION, *supra* note 11, at 718.

¹⁶³ See *id.* § 1245(a)(1), (3), *reprinted in* 2013 COMPILATION, *supra* note 11, at 717-21.

¹⁶⁴ See *EDBI at a Glance*, EXPORT DEV. BANK OF IRAN, <http://en.edbi.ir/lang-en/EDBI-At-a-Glance/default.edbi> (last visited Feb. 20, 2014).

¹⁶⁵ See *A Brief Look at Bank Mellat*, BANK MELLAT, <http://en.bankmellat.ir/tab389.aspx> (last visited Feb. 20, 2014).

¹⁶⁶ See *Concise History of Bank Melli Iran*, BANK MELLI IRAN, <http://www.bmi.ir/En/BMIHistory.aspx?smnuid=10011> (last visited Feb. 20, 2014).

¹⁶⁷ See *History*, BANK SADERAT IRAN, http://www.bsi.ir/en/Pages/About_BSI/History.aspx (last visited Feb. 20, 2014).

¹⁶⁸ See National Defense Authorization Act for Fiscal Year 2012 § 1245(a)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 717-21.

Thus, in the defense budget bill for fiscal year (FY) 2012, namely, section 1245 of the National Defense Authorization Act of 2012 (Defense Act), Congress took aim at the financial sector of Iran.¹⁶⁹ This new legislation contained three key measures, as follows.

B. Measure 1: Primary Money Laundering Concern Designation

First, Congress expressly designated the entire Iranian financial sector, including the CBI, to be of “primary money laundering concern.”¹⁷⁰ This sector posed a threat to the American government and banks because it laundered proceeds from illicit activities in pursuit of WMDs and terrorist causes, evaded sanctions, and deceived the government and banks about its operations. Such designations were made pursuant to section 311 of the USA PATRIOT Act, which Congress passed in 2001 and which is codified at 31 U.S.C. § 5318A. That Act has ten titles, the third of which is called the International Money Laundering Abatement and Financial Anti-Terrorism Act. This name bespeaks the purpose of Title III: to bolster the ability of American authorities to detect, deter, and prosecute money laundering and terrorist financing.

Under section 5318A, the Secretary of the Treasury could order, on a temporary basis, that financial institutions implement special measures for any transaction outside the United States in an area of primary money laundering concern. Those measures pertained to detailed record keeping, such as the identities, addresses, and roles of all participants in a transaction, including a wire transfer, and the identity of any foreigner authorized to use or route a transaction through a payable-through account (discussed below). In short, designation as a primary money laundering concern opened the possibility of obtaining more and better information about proliferation and terrorist financing.¹⁷¹

C. Measure 2: Iranian Bank Asset Freeze

Second, section 1245 of the 2012 Defense Act established a freeze on all assets of Iranian financial institutions within reach of American authorities.¹⁷² In particular, Congress ordered the President to block all transactions in any property or property interests of any Iranian financial institution if the property or interests were in, or came within, the United States, or within the possession of a United

¹⁶⁹ See *id.* § 1245, reprinted in 2013 COMPILATION, *supra* note 11, at 717-21.

¹⁷⁰ See *id.* § 1245(b), reprinted in 2013 COMPILATION, *supra* note 11, at 717.

¹⁷¹ Section 5318A also contained the criteria by which a jurisdiction is designated to be of “primary money laundering concern.” Those criteria included evidence of organized crime, terrorism or corruption, pervasive bank secrecy, and a high ratio of the volume of financial transactions to the size of the economy of the jurisdiction.

¹⁷² See National Defense Authorization Act for Fiscal Year 2012 § 1245(c), reprinted in 2013 COMPILATION, *supra* note 11, at 717.

States person.¹⁷³ Here, then, was an extension of the Property Transaction sanction from the 1996 to the 2010 legislation from dealings with assets of a sanctioned entity to those of Iranian banks, including Iran's Central Bank. Likewise, the new measure went beyond the 2010 CISADA freeze of assets belonging to individual Iranian government officials.

For example, suppose the CBI held funds in the Kansas City, Missouri branch of a foreign bank. Those funds would be frozen in that branch, notwithstanding the fact the branch was of a non-American bank, it was located in the United States, and hence subject to the freeze order.

Likewise, consider a wire transfer of United States dollars from the account of an Iranian bank held in an Australian bank in Singapore, to a South Korean bank in Seoul. Insofar as the wire transfer is routed through the United States, via Fedwire, or clears and settles on the books of an institution in the United States, such as the Federal Reserve Bank of New York, it comes within the United States, and thus could be frozen – even though the originator, originator's bank, beneficiary's bank, and beneficiary are all non-United States persons. Still another example, hypothetically, would be bonds owned by an Iranian bank for investment purposes, and held at the New Delhi branch of Citibank. The Iranian investor could not move them. While the investment account was in an overseas branch, the branch was that of a United States person, namely, an American bank.¹⁷⁴

Curiously, the asset freeze did not specify a punishment. In one sense, the prohibition was its own punishment: Iranian banks could not get their property if American officials got to it first, as they were likely assuming holders of the property alerted the officials as to what was in their possession. But what if a foreign bank in the United States, or a United States person abroad, violated the asset freeze by relinquishing funds, other property, or property interests pursuant

¹⁷³ On February 6, 2012, President Barack H. Obama signed Executive Order 13599 implementing the financial sanctions in the 2012 Defense Act, particularly the freezing of assets and other property held by Iranian banks, including the CBI, in the United States or by United States persons. *See* Exec. Order 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). The Iran Threat Reduction and Syria Human Rights Act of 2012 (discussed below) answered a question the Defense Act failed to address: under what conditions would the assets be unfrozen? The second Act said the blocking would continue until the President certified to the appropriate congressional committees in a written report (which could contain a classified Annex) that the CBI no longer provided financial services to help Iran acquire a WMD, or help or facilitate transactions for the Revolutionary Guard Corps. *See* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, § 217(a), (c)-(d)(1)-(2), 126 Stat. 1214-69 (codified as 22 U.S.C. 8711, 8721-24, 8741-44, 8781), *reprinted* in 2013 COMPILATION, *supra* note 11, at 727-28.

¹⁷⁴ *See* National Defense Authorization Act for Fiscal Year 2012 § 1245(h)(4), *reprinted* in 2013 COMPILATION, *supra* note 11, at 721 (defining "United States person" to mean a natural person who is a citizen or resident of the United States, or an entity organized under United States or State law).

to Iranian orders? Possibly, IEEPA sanctions would apply, because the basic statutory authority for the asset freeze was the IEEPA.¹⁷⁵

A dramatic instance of the effect of the prohibition on transactions involving Iranian bank assets came on September 18, 2013. The case involved Bank Melli.¹⁷⁶ United States District Judge Katherine Forrest approved the seizure by federal law enforcement authorities of the entire office block building at 650 Fifth Avenue in Manhattan. Led by the United States Attorney for the Southern District of New York, Preet Bharara, prosecutors explained that a non-profit organization operated by the Shah of Iran built the thirty-six-story structure in the 1970s. A loan from Bank Melli funded the construction.

Following the Islamic Revolution, the new government expropriated the building in 1979, and re-named the non-profit organization the “Alavi Foundation.” Alavi then co-owned the building with Assa Corporation, and the owners transferred rental income to Bank Melli. Those co-owners acted as “fronts” for Bank Melli, and their transfers to it violated both the American sanctions prohibition and money laundering laws. The forfeiture of the building was the largest-ever related to terrorism, and Mr. Bharara said proceeds from its sale would be used to compensate victims of terrorism sponsored by Iran.

D. Measure 3: Payments System Prohibition

To be engaged in international banking is to work with foreign banks. Even the largest of multinational banking organizations do not have subsidiaries, branches, agencies, or representative offices in all the countries of the world. Only in the minority of cases can they make and receive payments, and move assets, from one owner to another, and from one jurisdiction to another, as an “in-house transfer.” Frequently, they must work with one or more banks with which they hold an account, and in which the ultimate transferee, or beneficiary, also has an account.

Technically, those “accounts” are known as “correspondent.” As defined in section 311(e)(1)(B) of the USA PATRIOT Act, a “correspondent account” is:

¹⁷⁵ See *id.* § 1245(c), reprinted in 2013 COMPILATION, *supra* note 11, at 717. The basic statutory authority for the asset freeze was the IEEPA. Note the expansion of the menu of mandatory sanctions from three to five out of nine occurred via the other bill Congress passed against Iran in 2012, the Iran Threat Reduction and Syria Human Rights Act of 2012 (discussed below).

¹⁷⁶ See *New York Office Tower Seized over Payments to Iran*, BBC NEWS (Sept. 18, 2013), <http://www.bbc.co.uk/news/world-us-canada-24146454>.

[A]n account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution.¹⁷⁷

Logically, a bank holding a “correspondent account” is called a “correspondent bank.”

For example, consider a transfer of funds from the Indonesian *rupiah*-denominated account of a Jakarta-based importer of Persian carpets held at Hong Kong Shanghai Banking Corporation (HSBC) in Jakarta. The transfer is to pay for carpets shipped by an Iranian exporter in Tabriz, but the exporter seeks payment in Indian *rupees*, not Indonesian *rupiah*. (The payment could be pursuant to a commercial letter of credit issued by HSBC for the benefit of the Tabriz exporter.) Could the *rupee* transfer be in house? That could happen only if HSBC holds a rupee-denominated account for both the importer-originator-payor and exporter-beneficiary-payee.

Assume HSBC does not hold both accounts. But suppose the exporter has a *rupee*-denominated account at Bank Melli that is held at Karnataka Bank (KB), which is a private-sector entity, in Bangalore.¹⁷⁸ (That is, KB holds a *rupee* account for Bank Melli, which in turn holds a *rupee* account for the exporter.) Also, assume HSBC also has a *rupee* account at KB.¹⁷⁹ Then, HSBC in Jakarta can: (1) debit the *rupiah* account of the importer for the *rupee*-equivalent of the price of the carpets; (2) transfer electronically the *rupees* to its account at KB; and (3) instruct KB to debit its account with KB and credit the account of Bank Melli at KB for onward payment to the exporter at KB.

In this instance, KB serves as a correspondent bank, with the HSBC account at KB being the correspondent account. KB links the Jakarta importer with the Tabriz exporter because it (KB) holds the accounts of both the importer’s bank and the exporter. As this hypothetical example suggests, correspondent banking is essential to the smooth flow of international trade transactions. The example also intimates there are foreign banks, like KB, that maintain correspondent accounts and that conduct financial transactions with Iranian banks, like Melli.

Accordingly, via the third key measure in the 2012 Defense Act, Congress sought to cut off Iranian financial institutions from correspondent banking, with limited exceptions. Congress prohibited the opening or maintaining of a correspondent account (or the imposition of strict conditions on any extant

¹⁷⁷ 31 U.S.C. § 5318A(e)(1)(B); see also National Defense Authorization Act for Fiscal Year 2012 § 1245(h)(1), reprinted in 2013 COMPILATION, *supra* note 11, at 721. (defining “correspondent account” by reference to Section 5318A).

¹⁷⁸ See *List of Banks in India*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_banks_in_India (last visited Mar. 15, 2014).

¹⁷⁹ A correspondent account may be classified as “*nostro*” or “*vostro*.” From the perspective of HSBC, its account with SBI is a “*nostro*” account, meaning “our account with you.” Conversely, from the perspective of SBI, the account is a “*vostro*” one – “your account with us.”

such account) by a “foreign financial institution” that the President decides “has knowingly conducted or facilitated any significant financial transaction” with the CBI or any Iranian bank the Secretary of the Treasury designated for imposition of IEEPA sanctions.

The same ban applied to payable-through accounts (PTA) at a foreign financial institution: they were forbidden (or strictures could be imposed on them) if that institution knowingly did big business with the CBI or sanctioned Iranian banks. Under section 311(e)(1)(C) of the USA PATRIOT Act, a:

“[P]ayable-through account” means an account, including a transaction account (as defined in section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution [in the United States] by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.¹⁸⁰

Essentially, a PTA is a demand deposit (i.e., checking) account at a U.S. bank whereby a customer of a foreign bank can write checks. Such a customer – the end user – may not be subject to the same scrutiny by the American bank as is a regular customer of that bank, meaning an Iranian customer could use the account to launder funds from, or make payments for, unlawful purposes.

Accordingly, to alter the above hypothetical, suppose KB holds a *rupee*-denominated PTA for HSBC. That would mean customers of HSBC, such as the Jakarta importer, could make payments via checks, money orders, and other instruments from that PTA. The Jakarta exporter then could draw such an instrument, in rupees, on that PTA for the order of the Tabriz exporter.

So, in the original and modified version of the above hypothetical, suppose the President determines KB has knowingly engaged in significant financial dealings with CBI or an Iranian bank to which American sanctions apply. Then, the President could forbid KB from maintaining the correspondent account or PTA of HSBC (or impose strict conditions on either).

As with the Iranian bank asset freeze, Congress did not mandate a sanction with the payments system prohibition. That is, Congress authorized (but did not require) the President to impose IEEPA sanctions on the CBI.¹⁸¹ As for

¹⁸⁰ See 31 U.S.C. § 5318A(e)(1)(C); see also National Defense Authorization Act for Fiscal Year 2012 § 1245(h)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 721 (defining “payable through account” by reference to section 5318A).

¹⁸¹ See National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(1)(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 718 (stating the President “may” impose IEEPA sanctions on the CBI). The sanctions potentially applied to an individual, as well as the CBI, who violated, attempted to violate, conspired to violate, or caused a violation of the payments system prohibition. See *id.* § 1245(g)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 721.

other Iranian banks, there was no need for Congress to specify a penalty. The Treasury Secretary already had designated them for IEEPA sanctions under the existing 1996 and 2010 Act regime, or did so contemporaneously with application of the prohibition.¹⁸²

Manifestly, the prohibition was designed to ostracize Iranian banks from the international banking network, making payments to or for them all but impossible. Of significance was that the prohibition vastly expanded the architecture of measures against Iran from the energy sector to all sectors. Whether payments were made in connection with petroleum or petroleum products did not matter: Iran was to be denied the use of correspondent banking facilities and PTAs for all purposes. So, even if, as in the hypothetical, Iran could sell Persian carpets, or for that matter, pistachios, to a non-United States buyer, it could not get paid for them, and therefore, it would have to resort to barter trade, if not subterfuge.

E. Payments System Prohibition Definitional Issues

Taking specific aim at Iran's Central Bank was a key to ostracizing the entire Iranian financial sector. As in any country, Iranian banks rely on their Central Bank for a variety of foreign exchange, clearing and settlement, and payments functions in transactions with the rest of the world. Yet, as its language and the hypothetical suggest, that objective was not easy to enforce.

There were definitional issues. First, a "foreign financial institution" under section 104(i) of CISADA was not defined at all: instead, it depended on what the Treasury Secretary thought.¹⁸³ Though not a major difficulty, recourse to Treasury regulations was necessary.

Second, exactly what did Congress mean by "significant" financial transactions between a foreign financial institution and the CBI or a sanctioned Iranian bank? Was the President to look at the volume or value of transactions, or both? How would a single U.S. \$100 million event occurring six years ago rate in comparison to three U.S. \$25 million events occurring three years ago? Similarly, how would the President determine whether the foreign financial institution intentionally engaged in the deal, thus meeting the "knowingly" requirement? Third, precisely how was the President to go about convincing a foreign financial

¹⁸² See *id.* § 1245(d)(1)(A), reprinted in 2013 COMPILATION, *supra* note 11, at 718 (referring to "another Iranian financial institution designated by the Secretary of the Treasury for the imposition of sanctions"). The sanctions potentially applied to an individual, as well as a foreign financial institution, who violated, attempted to violate, conspired to violate, or caused a violation of the payments system prohibition. See *id.* § 1245(g)(2), reprinted in 2013 COMPILATION, *supra* note 11, at 721.

¹⁸³ See *id.* § 1245(h)(2), reprinted in 2013 COMPILATION, *supra* note 11, at 721 (referring to CISADA § 104(i), 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b). Section 8513(i), Sub-Section (1)(D) leaves to the discretion of the Treasury Secretary the delineation of "foreign" from "domestic" financial institutions.

institution, like SBI, to close a correspondent account in furtherance of America's sanctions policy goal of ostracizing Iran from the world of international banking?

F. Third Country Central Bank Exception to Payments System Prohibition

More serious issues than those of definitions surrounding enforcement of the payments system prohibition were navigating its exceptions. The 2012 Defense Act contained an obvious exception for sales of food and medicine to Iran.¹⁸⁴ A person supplying agricultural commodities, medicines, or medical devices could do so under the 1996 and 2010 sanctions rules. Thus, it would be illogical to forbid a foreign financial institution from opening or maintaining a correspondent account or PTA used by or for the benefit of the CBI for these essentially humanitarian transactions.

A greater controversy concerned potential application of the prohibition and sanctions to a foreign central bank other than the CBI. In the above hypothetical, could the Reserve Bank of India (RBI), or a state-owned bank like Punjab National Bank, be in trouble? Surely Congress did not mean to threaten the RBI – or, for that matter, the likes of the Bank of England and Bank of Japan – and all nationalized, public sector banks in India. Indeed, to avoid ensnaring all non-Iranian foreign central banks, Congress deemed that sanctions would apply to these banks only if they engaged in a financial transaction for the sale or purchase of petroleum or petroleum products to or from Iran.¹⁸⁵ In doing so, Congress both created the necessary exemption and tightened the prohibitions on Iran's energy sector.

To illustrate, suppose Iran sold crude oil to or purchased refined gasoline from the Indian Oil Corporation, the state-owned oil and gas firm headquartered in New Delhi and India's largest commercial enterprise.¹⁸⁶ Indian Oil seeks to pay for the crude oil or receive payment for the gasoline via its account held with SBI, which in turn holds an account at the RBI. If RBI conducts the payment transaction for Indian Oil, then the President must apply sanctions to the RBI. Obviously, then, Congress sought to knock out any central bank from assisting Iran in receiving or transferring funds in connection with its energy resources.

It is difficult, if not impossible, to find a precedent for this kind of measure. It is unilateral, undertaken by the United States, against sovereign foreign central banks of third countries not accused directly of wrongdoing. Denying access to the payments system itself was an aggressive move against foreign financial institutions. Threatening foreign central banks, too, albeit in respect of energy dealings with Iran, was all the more dramatic. Traditionally, the world of central banks is a collegial, if not clubby, one. For the United States to

¹⁸⁴ See *id.* § 1245(d)(2), reprinted in 2013 COMPILATION, *supra* note 11, at 721.

¹⁸⁵ See *id.* § 1245(d)(3), reprinted in 2013 COMPILATION, *supra* note 11, at 718.

¹⁸⁶ See generally *Homepage*, INDIAN OIL CORP., <http://www.iocl.com/home.aspx> (last visited Feb. 20, 2014).

take a potentially adversarial approach to foreign central banks, essentially declaring it would not tolerate them as accomplices of Iran, was incongruous with the trusting, diplomatic culture central banks enjoyed.

G. Third Country Short Supply Exception to Payments System Prohibition

Still another exception to imposition of sanctions was for short supplies of crude oil to third countries.¹⁸⁷ Congress mandated bi-monthly reporting on non-Iranian petroleum and petroleum product prices and availability.¹⁸⁸ It did so in connection with a mandate that the President determine whether non-Iranian crude oil sources were sufficient to allow buyers in third countries around the world to “reduce significantly” the volume of their purchases from Iran.¹⁸⁹ By that, Congress meant cutting dependence (as shown by paying lower prices or buying less quantities) on Iranian energy, specifically crude oil, with a view toward complete cessation of dependence on Iran.¹⁹⁰

The link to sanctions was this: suppose a foreign financial institution, such as KB in the above hypothetical, engaged in a financial transaction via a correspondent account or PTA, where the underlying commercial deal involved Iranian petroleum or petroleum products and a third country. For instance, assume that deal entailed an Indian oil importer, like Indian Oil Corporation, buying Iranian crude. Suppose Iran is paid via funds credited to the correspondent account or PTA held by KB.

Without the third country short supply exception, a foreign bank, like KB, was vulnerable to sanctions because of the correspondent account or PTA used to conduct payment from the third country, India, to Iran for the oil. With this exception, however, sanctions would apply only if the supply of crude oil from non-Iranian sources was sufficient to permit a significant reduction in sourcing crude oil from Iran. After all, it would be unfair to India or other third countries to penalize their banks if they had no choice but to buy oil from Iran to meet their energy needs.

Yet, administering the third country short supply exception was fraught with economic and political difficulties. The President had to ascertain the energy

¹⁸⁷ See National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(4)(C), *reprinted in* 2013 COMPILATION, *supra* note 11, at 719.

¹⁸⁸ See *id.* § 1245(d)(4)(A), *reprinted in* 2013 COMPILATION, *supra* note 11, at 718. The Energy Information Administration prepares the reports, in consultation with the State and Treasury Departments, and Central Intelligence Agency (CIA).

¹⁸⁹ See *id.* § 1245(d)(4)(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 718-19.

¹⁹⁰ See *id.* § 1245(d)(4)(C)-(D)(i)(II), *reprinted in* 2013 COMPILATION, *supra* note 11, at 719. Note section 1245(d)(4)(C) called for reporting on “petroleum and petroleum products,” whereas the sanctions exception in section 1245(d)(4)(D)(i)(I)-(II) focused on crude oil, i.e., third countries had to cut their dependence on unrefined Iranian oil to avoid imposition of sanctions on their financial institutions.

demand and supply situation in every country, and then compare and contrast Iranian and non-Iranian sources. In evaluating what third countries could or should have done, the President risked looking like he was dictating to them what their energy policies ought to be. India, China, and other energy-hungry emerging countries hardly were happy with that scenario, one in which they might wind up dependent on sources controlled, directly or indirectly, by the United States.

In fact, third countries persisted in buying Iranian crude, evidenced by Iranian oil revenues: “Astonishingly, Iran earned \$600 bn [billion] in oil revenues over the past eight years [2006–2013], more than its total accumulation since oil was discovered more than a century ago.”¹⁹¹ Of course, due to American financial sanctions, between U.S. \$50 and \$100 billion of Iran’s holdings of foreign exchange were in frozen bank accounts.¹⁹² Thus, “[o]ne of Mr. [Hassan] Rouhani’s most troubling discoveries upon taking office [as President in August 2013] was to find the treasury empty.”¹⁹³

Moreover, pressure from America on India (or other third countries) created an internal political dynamic within India. Sanction relief for a foreign financial institution (e.g., an Indian bank like KB) would be based on the country with primary jurisdiction (India) over that institution cutting its dependence on Iranian oil.¹⁹⁴ A foreign bank then had the choice of pleasing the United States by lobbying its government to push its oil importers to eschew Iranian crude, or pleasing its government by rejecting the role of American agents. Being in this position hardly would endear the foreign bank, its government, or its oil importers to the American sanctions regime.

Perhaps in anticipation of this dynamic, Congress obligated the President to “carry out an initiative of multilateral diplomacy to persuade [third] countries purchasing oil from Iran” that they should limit the use by Iran of revenues Iran earned from oil sales to those third countries to buy non-luxury consumer goods from those countries.¹⁹⁵ For example, if India buys oil from Iran, then it should try to cut sales of consumer items to Iran. In effect, the initiative was designed to weaken bilateral trade ties between Iran and third countries. (It also aimed to prohibit Iran from buying military or dual use items, or any other material that could enhance its WMD capabilities.¹⁹⁶)

¹⁹¹ Roula Khalaf, Lionel Barber & Najmeh Bozorgmehr, *Rouhani’s 100-day Revolution*, FIN. TIMES, Dec. 1, 2013, at 6.

¹⁹² *Id.* As to where some oil revenues not in frozen accounts may have gone, the Financial Times reported the previous Administration of President Mahmoud Ahmedinejad “used Iran’s central bank as a piggy bank, ordering it to dole out loans [e.g., on politically favorable projects that were not economically viable] that had little chance of being repaid.” *Id.*

¹⁹³ *Id.*

¹⁹⁴ See National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(4)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 718-19.

¹⁹⁵ See *id.* § 1245(e)(1)(A)(i), reprinted in 2013 COMPILATION, *supra* note 11, at 720.

¹⁹⁶ See *id.* § 1245(e)(1)(A)(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 720.

That this initiative was multilateral hardly changed the optics of the sanctions regime. From the perspective of third countries like India, the initiative was impelled by an American statute, led by an American President, and designed to suit American foreign policy and national security goals. Indeed, the unilateralism-cloaked-in-multilateralism affected not only third country oil consumers like India, but also non-Iranian oil sources, like Iran's partners in the Organization for Petroleum Exporting Countries (OPEC). Congress instructed the President to "conduct outreach" to the likes of Saudi Arabia and Indonesia to encourage them:

[T]o increase their output of crude oil to ensure there is a sufficient supply of crude oil from countries other than Iran, and to minimize any impact on the [world market] price of oil resulting from the imposition of [the asset freeze and payments system] sanctions under [section 1245 of the 2012 Defense Act].¹⁹⁷

Simply put, the United States was to lead a multi-country charge at third country suppliers to cajole them into boosting production to fill the diminution in Iranian oil caused by third country purchasers, under pressure, looking elsewhere than Iran.¹⁹⁸

It must be underscored that the overall goal of these provisions was breathtaking: the United States aimed to change the pattern of world trade in crude oil by knocking Iran out of that pattern. That is why the President had to monitor the supply-demand picture in third countries and sign on as many countries as possible to a coalition of the willing.

That the United States was one potential supplier also cannot go unmentioned.¹⁹⁹ Thanks to new drilling technologies (including the controversial hydraulic fracturing, or "fracking"), the Energy Information Administration forecast that, by 2016, the United States would produce more crude oil than at any time since the banner year of 1970 (9.6 million barrels per day). Yet, because of an export ban on oil implemented in 1975, following the 1973 Arab oil embargo, the United States could not ship crude abroad. Why not remove the statutory ban and thereby not only help third countries forego Iranian oil, but also hand over to American producers the market share in those countries held by Iran?²⁰⁰

¹⁹⁷ See *id.*

¹⁹⁸ The President was obliged to report to Congress biannually on these efforts, and the reports could have a classified Annex. See *id.* § 1245(e)(2), reprinted in 2013 COMPILATION, *supra* note 11, at 720.

¹⁹⁹ See Ari Natter, *Wyden "Hopes" to Hold Hearing on Crude Oil Exports Soon; Spokesman Cites Concerns*, 31 INT'L TRADE REP. 103 (2014); see also Ari Natter, *Chamber of Commerce President Predicts End of 40-Year Ban on Crude Oil Exports*, 31 INT'L TRADE REP. 103 (2014).

²⁰⁰ See generally Ajay Makan & Neil Hume, *The Cartel's Challenge*, FIN. TIMES, Dec. 2, 2013, at 10 (discussing the shale gas revolution and prospects for the United States

The third country short supply exception also was problematic from a practical legal perspective. The kind of financial transaction for which a foreign bank could be penalized had to be one involving (1) “trade in goods or services between the country with primary jurisdiction [e.g., India] over the foreign financial institution [e.g., KB] and Iran” and (2) “any funds owed to Iran as a result of such trade [which] are credited to an account located in the country with primary jurisdiction over the foreign financial institution.”²⁰¹ The above hypothetical easily meets both prongs. But what if Indian Oil Corporation was a middle party, brokering an oil sale by Iran to Bhutan? Would a payment routed from the Bhutanese capital, Thimpu, to Tehran via KB render KB liable? Or, what if the underlying transaction was not for “goods,” that is, crude oil, but for consulting provided by Iranian petroleum engineers to the Bhutanese government? Would KB be liable on the rationale that consulting is a “service” within the first prong?

H. Sanctions Waiver Criteria Ambiguities

Congress granted the President discretion to waive sanctions on a foreign financial institution for violations of the payments system prohibition. To qualify, the President had to apply four criteria. First, it had to be in the “national security interest of the United States” not to impose sanctions on that institution.²⁰² Second, the President had to justify the waiver to Congress.²⁰³ Third, there had to be “exceptional circumstances” preventing the country with primary jurisdiction over the foreign financial institution from reducing significantly its purchases of Iranian petroleum and petroleum products.²⁰⁴ Fourth, the President had to explain the “concrete cooperation” he received, or would receive, thanks to the waiver.²⁰⁵ Even if all four criteria were met, the President could waive sanctions for only up to 120 days, with additional 120-day renewals possible under those same criteria.

The language of the first criterion was commonplace among sanctions waiver provisions, and the second criterion was unsurprising. The third and fourth were ambiguous. “Exceptional circumstances” were undefined, as was “concrete cooperation.” Suppose in the above hypothetical India argued to the President that a surge in energy consumption in India, thanks to strong growth in the

to become the largest oil producer in the world); Ed Crooks & Geoff Dyer, *Strength in Reserve*, FIN. TIMES, Sept. 6, 2013, at 5 (discussing how the shale boom, while not likely to allow the United States to disengage from the Middle East, will enhance its international diplomatic authority).

²⁰¹ See National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(4)(D)(ii)(I)-(II), reprinted in 2013 COMPILATION, *supra* note 11, at 719.

²⁰² See *id.* § 1245(d)(5)(A), reprinted in 2013 COMPILATION, *supra* note 11, at 719.

²⁰³ See *id.* § 1245(d)(5)(B)(i), reprinted in 2013 COMPILATION, *supra* note 11, at 719.

²⁰⁴ See *id.* § 1245(d)(5)(B)(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 720.

²⁰⁵ See *id.* § 1245(d)(5)(B)(iii), reprinted in 2013 COMPILATION, *supra* note 11, at 720.

manufacturing sector, caused India to import more oil than expected from Iran. Was this scenario exceptional, or one to be expected given India's efforts at industrialization? To take another example, suppose China outmaneuvered India in trying to obtain sources of oil in Africa to substitute for Iran. That is, China was able to secure FDI and energy supply contracts in Sub-Saharan Africa for which India had also competed, but lost. Consequently, India could not lessen its dependence on Iranian crude oil. Would these circumstances be "exceptional?" Even what might be traditionally thought of as "exceptional" – war or other violent conflict – arguably could be regarded as expected. For example, if India urged that it could not lessen its dependence on oil from Iran because of unrest in three substitute countries – Iraq, Nigeria, and Venezuela – would that be "exceptional?"

Likewise, hypothetical illustrations point out the difficulty in ascertaining what kind of cooperation from India would be "concrete." Would the cooperation need to be related directly to Iran? Or, would help on other matters – such as stepped up patrols against piracy in the Straits of Malacca by Indian Naval vessels, or increased FDI in Afghanistan to help it repair its infrastructure – suffice?

IX. PHASE 9: 2012 IRAN-SYRIA ACT'S NEW EXPANSIVE CONSTRUCTIONS (AUGUST 10, 2012 THROUGH DECEMBER 31, 2016)

A. Ten Further Measures (August 10, 2012 Through December 31, 2016)

With the Iran Threat Reduction and Syria Human Rights Act of 2012 (Iran-Syria Act), the United States continued its traverse far across the Rubicon, as it were, tightening the 1996 Iran Sanctions Act, as amended in 2010 by CISADA, and tightening CISADA, yet again.²⁰⁶ It did so in ten principal manners: six

²⁰⁶ See generally Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214-69, *reprinted in* 2013 COMPILATION, *supra* note 11, at 721.

To be clear, some of the changes ushered by the Iran-Syria Act were to the 1996 Iran Sanctions Act as amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, 22 U.S.C. §§ 8512, 8513a, 8514, 8514a, 8514b, while other changes made by the Iran-Syria Act were to the 2010 CISADA. That is evident from the 2013 COMPILATION, *supra* note 11, at 685, 708, which indicates that the 1996 and 2010 legislations were amended by Public Law 112-158 (Iran Threat Reduction and Syria Human Rights Act of 2012), which is, of course, the 2012 Act. It also is clear simply by comparing the OVERVIEW, PART I, *supra* notes 4, 19, which includes the 1996 and 2010 Acts before the 2012 Act, with the 2013 COMPILATION, *supra* note 11, which includes the 2012 Act amendments.

Also, the changes discussed above occurred via the 2012 Iran-Syria Act, as well as via the Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013, *reprinted in* 2013 COMPILATION, *supra* note 11, at 736. But, they applied retroactively to ninety days after enactment of the original CISADA. See, e.g., CISADA §§ 103(a), 105(b)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 708, 711.

concerning illegal business conduct with Iran; one dealing with human rights; one pertaining to punishments for engaging in prohibited conduct; and one affecting criteria for waiving those punishments.²⁰⁷ Succinctly put, America dubbed more

²⁰⁷ Various features of the sanctions regime did not need amendment and thus remained unchanged. These included provisions on publication in the Federal Register and publication of projects. *Compare* Iran Sanctions Act of 1996 § 5(d)-(e), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1139-40, *with* Iran Sanctions Act of 1996 §§ 5(d)-(e), *amended further by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 696.

No substantive changes (only minor renumbering) were made under the 2012 Act to the list of exceptions under which the President was not mandated to apply sanctions. *Compare* Iran Sanctions Act of 1996 § 5(f), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1140, *with* Iran Sanctions Act of 1996 § 5(f), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 696-97. That is, the key exceptions remained for (1) procurement of defense goods and services “essential to the national security of the United States,” defense goods or services supplied by a “sole source supplier” with no “readily or reasonably available” alternative, or defense goods or services “essential to the national Security” under coproduction agreements; (2) spare parts or components (but not finished goods) “essential” to American manufacturing; (3) service and maintenance of products where there is no “readily or reasonably available” alternative; (4) information and technology “essential” to American products or production; or (5) humanitarian items, such as medicines. *See* Iran Sanctions Act of 1996 § 5(f)(1)-(6), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 696-97.

Likewise, the 2012 Act did not change (aside from minor cross-referencing updates) the statutory provisions on advisory opinions, the termination, delay, or duration of sanctions, the contents of any report in support of a Presidential waiver of sanctions, required reports to the appropriate congressional committees, the non-reviewability of sanctions, exclusion of certain activities, or the December 31, 2016 sunset date. *Compare* Iran Sanctions Act of 1996 §§ 7-8, 9(a)-(b), 9(c)(2), 10-13, *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1143-47, *with* Iran Sanctions Act of 1996 §§ 7-8, 9(a)-(b), 9(c)(2), 10-13, *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 700-04.

Definitions of key terms – namely, “act of international terrorism,” “appropriate congressional committees,” “component part,” “develop and development,” “financial institution,” “finished product,” “foreign person,” “goods and technology,” “investment,” “Iran,” “Iranian diplomats and representatives of other government and military or quasi-governmental institutions of Iran,” “knowingly,” “nuclear explosive device,” “person,” “petroleum resources,” “refined petroleum products,” “services,” “United States or State,” and “United States Person” – also remained the same. *Compare* Iran Sanctions Act of 1996 §§ 14(a)(1)-(18), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1147-50, *with* Iran Sanctions Act of 1996 §§ 14(1)-(3), (5)-(15), (17)-(21), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 704-07. But, the 2012 Act added three new terms: “credible information,” “petrochemical product,” and “services.” *See* Iran Sanctions Act of 1996 §§ 14(4), (16), (19), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 705, 707. As explained above, all three terms helped delineate an enlarged scope of behavior prohibited under section 5.

activities with Iran illegal, closed loopholes to behavior it previously identified as unlawful, set additional sanctions for transgressions, and increased the difficulty of obtaining a waiver of penalties.²⁰⁸ All in all, the new constrictions were expansive.

As with ILSA in 1996, CISADA in 2010, and the Iran-Syria Act in 2012, the 112th Congress professed not to abandon multilateralism.²⁰⁹ The problem with a team approach, however, was that even after – or maybe because of – decades of sanctions, not everyone was playing on the American team against Iran by the rules America set.

So, Congress called for “prompt enforcement of the current multilateral sanctions regime with respect to Iran” and “expanded cooperation with international sanctions enforcement,” thereby intimating its displeasure that third countries were not adhering to United Nations or American rules.²¹⁰ Congress, convinced that the sanctions imposed by the Security Council and allies did not go far enough, urged the President to “intensify diplomatic efforts” aimed at convincing the United Nations and individual allies to expand prohibitions and sanctions to: (1) forbid issuing visas to Iranian officials involved in WMD development, terrorist support, or human rights abuses; (2) bar landing at seaports by vessels of the Islamic Republic of Iran Shipping Lines and at airports of cargo flights of Iran Air, because of their “role . . . in proliferation and illegal arms sales”; (3) limit the development of petroleum resources in Iran; and (4) restrict Iran’s importation of refined petroleum.²¹¹

In keeping with the 2012 Budget Act, Congress instructed the President to coax out increased crude oil production in third country suppliers to help third country buyers wean themselves off Iranian energy, and thereby reduce revenues Iran could generate from those sales to zero.²¹² To be sure the rest of the world understood what Congress wanted, and perhaps to jawbone compliance, Congress told the President he had to report biannually on third countries that were not imposing measures against Iran.²¹³ Interestingly, Congress has influence in the

²⁰⁸ Among the loopholes closed was a clarification that sanctions could be imposed on foreign persons who assisted in the evasion of American sanctions. The clarification came, however, not via the 2012 Iran-Syria Act statutory language, but via Executive Order Number 13608. President Barack H. Obama signed this Order on May 1, 2012, invoking the authority (*inter alia*) of the IEEPA. See Exec. Order No. 13,608, 77 Fed. Reg. 26,409 (May 1, 2012). Sanctions on evaders could be lifted only if the criteria for the CISADA Sunset Rule (discussed earlier) were met, namely, Iran changed its behavior with respect to WMDs and terrorism. See Iran Threat Reduction and Syria Human Rights Act of 2012 § 217(b), reprinted in 2013 COMPILATION, *supra* note 11, at 727; CISADA § 401(a), 22 U.S.C. § 8513a.

²⁰⁹ For a chart of the sessions of Congress, see *Guide: Congressional Session Chart*, *supra* note 7.

²¹⁰ See Iran Threat Reduction and Syria Human Rights Act of 2012 § 101(1), (2)(D), reprinted in 2013 COMPILATION, *supra* note 11, at 721-22.

²¹¹ See *id.* § 102(a), (a)(1)-(3), reprinted in 2013 COMPILATION, *supra* note 11, at 723.

²¹² See *id.* § 102(a)(4)-(5), reprinted in 2013 COMPILATION, *supra* note 11, at 723.

²¹³ See *id.* § 102(b), reprinted in 2013 COMPILATION, *supra* note 11, at 723-24.

actions related to Iran of the World Trade Organization, and its predecessor, the General Agreement on Tariffs and Trade. If either body adjudicated a decision about sanctions on Iran, then Congress wanted to know beforehand, perhaps it could make an *a priori* admonition against an adverse outcome or a notification that it would take countermeasures against such an outcome.²¹⁴

B. 1st: Expanded Prohibitions Against Iranian Energy Sector

The 2012 Iran-Syria Act clarified – in effect, expanded – the list of prohibited transactions. The two broad sanctionable behaviors remained the same: (1) economic transactions in the energy (meaning petroleum or refined gasoline) sector of Iran, and (2) dealings relating to WMDs or advanced conventional weaponry. But comparing the lists of prohibited transactions under the 1996 Iran Sanctions Act, as amended in 2010 by CISADA, and the 2012 legislation showed how Congress plugged gaps, sometimes with expansive language, and other times with precise terms.

Its main target again was the sector in which Iran traditionally held an international comparative advantage: energy. In both the 1996-2010 and 2012 iterations of the legislation, the prohibition against investing more than U.S. \$20 million in a twelve-month period in the petroleum sector of Iran remained the same.²¹⁵ However, the new legislation effectively lowered the threshold to U.S. \$1 million per transaction, or U.S. \$5 million annually. That was because it barred provision of goods, services, technology, or support to Iran that “could” help it develop its petroleum resources.²¹⁶ In other words, not only was foreign direct investment in that sector illegal, but so too was nearly any transaction.

Moreover, the 2012 Iran-Syria Act tightened other economic prohibitions against dealing with Iran’s most important sector, energy, as follows:

²¹⁴ See *id.* § 102(b)(6), reprinted in 2013 COMPILATION, *supra* note 11, at 724.

²¹⁵ Compare Iran Sanctions Act of 1996 § 5(a)(1), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1135-36, with Iran Sanctions Act of 1996 § 5(a)(1), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 688.

²¹⁶ Compare Iran Sanctions Act of 1996 § 5(a)(1), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1135-36, with Iran Sanctions Act of 1996 § 5(a)(5(A), (B)(i), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 690.

1. Prohibition Against Helping Iran Produce Refined Petroleum Products²¹⁷

In the 2012 legislation, Congress clarified this prohibition applied not just to providing Iran with goods, services, technology, information, or support for it to construct, modernize, or repair petroleum refineries (as under the 1996 and 2010 legislation). It also covered any “direct and significant assistance . . . directly associated with infrastructure, including construction of port facilities, railways, and roads, the *primary use* of which is to support the delivery of refined petroleum products.”²¹⁸ This expansive language essentially barred any trade or investment in the infrastructure of Iran, as long as such transactions were entered into “knowingly” (meaning actual or constructive knowledge),²¹⁹ exceeded a U.S. \$1 million threshold (or U.S. \$5 million in twelve months), and “could” possibly help Iran.

Exactly how the United States would determine whether a particular Iranian port, railway, or road was “primarily used” by petroleum refiners was unclear. Did “primary use” mean 51 percent of the traffic? Over what period? By what measure (value or volume)? Who would obtain the data and check the figures? Would a telecommunications facility, or a petroleum engineering school, be considered “infrastructure” (given that the new language was non-exclusive by virtue of the preposition “including”). Perhaps these questions were what Congress intended, namely, to deter traders and investors by injecting uncertainty into their dealings with Iran.

2. Prohibition Against Exportation of Refined Petroleum Products to Iran²²⁰

It remained illegal to sell refined petroleum to Iran and to provide it with goods, services, technology, information, or support that might help it import refined petroleum. But the 2012 language closed a loophole and broadened the meaning of what “could directly and significantly contribute” to Iran’s ability to import gasoline. The loophole concerned barter trade.

²¹⁷ Compare Iran Sanctions Act of 1996 § 5(a)(2)(B), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135-36, *with* Iran Sanctions Act of 1996 § 5(a)(2)(B), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 688.

²¹⁸ See Iran Sanctions Act of 1996 § 5(a)(2)(A)-(B), (5)(A), (B)(ii), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 688, 690.

²¹⁹ See *id.* § 14(13), *reprinted in* 2013 COMPILATION, *supra* note 11, at 706.

²²⁰ Compare Iran Sanctions Act of 1996 § 5(a)(3)(B)(i)-(iii), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1137, *with* Iran Sanctions Act of 1996 § 5(a)(3)(B)(i)-(v), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 689.

Suppose a country, such as China or India, shipped gasoline it refined (possibly from Iranian crude oil) to Iran, in exchange for pistachios. Such bartering, and any insurance for it, was illegal under the new language.²²¹ After all, barter trade easily “could” be a “significant contribution” to Iran’s ability to import refined petroleum – indeed, it was.

3. Prohibition Against JVs for Iranian Petroleum Resource Development²²²

American sanctions under the 1996 legislation, as amended in 2010, barred investments above U.S. \$20 million in petroleum resource development in Iran. They did not expressly forbid investments in petroleum resources outside of Iran that may redound to the benefit of Iran. For instance, a person could enter into a JV agreement for petroleum resources in Venezuela, and the deal might help Iran develop its petroleum resources within Iran. It could do so if Iran was a JV partner, or otherwise obtained goods, services, or know-how from the Venezuelan project that Iran could transfer and apply to its own sector.

Once again, Congress moved to close the loophole, and in so doing, unilaterally expanded the extraterritorial reach of the sanctions. Via the 2012 amendments, Congress forbade any JV in petroleum resources anywhere in the world outside of Iran if the Iranian government was a “*substantial* partner or investor,” or Iran “*could*, through a direct *operational* role . . . or by *other means*, receive technological knowledge or equipment not previously available to Iran that *could* directly and significantly contribute to the enhancement of Iran’s ability to develop petroleum resources in Iran.”²²³ The italicized terms gave wide latitude for interpretation. In turn, prospective JV partners would be uncertain as to whether a project might run afoul of the prohibition, and likely eschew the project – an effect Congress no doubt sought.

Two points about this amendment were remarkable. First, the fact that the JV might help a developing or least developed country, such as in West Africa, was irrelevant. If a deal had the potential to help Iran, then it did not matter if it might also help a poor country seeking to grow, alleviate internal poverty, or combat Islamist extremism.

²²¹ See Iran Sanctions Act of 1996 § 5(a)(3)(B)(iv), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 689.

²²² Compare Iran Sanctions Act of 1996 § 5(a), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1135-37, *with* Iran Sanctions Act of 1996 § 5(a)(4), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 689-90.

²²³ See Iran Sanctions Act of 1996 § 5(a)(4)(A)(ii), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 690. The mens rea requirement again was “knowingly.” See *id.* § 14(13), *reprinted in* 2013 COMPILATION, *supra* note 11, at 706.

Second, the amendment applied retroactively to all JVs on or after January 1, 2002 through enactment of the 2012 Iran-Syria Act.²²⁴ That is, any JVs established in the last decade were sanctionable. The only way to avoid sanctions was to terminate the JV within 180 days of enactment of the 2012 Act.²²⁵ Bluntly put, this sanction not only barred future investments in all third countries, but it also demanded disinvestment around the world. That such retroactivity might be an unconstitutional taking, or at least an unfair one, seemed not to matter.

4. Prohibition Against Buying Iranian Petrochemical Products²²⁶

So eager was Congress in 2012 to impede Iran from developing its petroleum resources that it expanded the sanctions regime to cover “petrochemical products.” These downstream articles included “any aromatic, olefin, or synthesis gas, and any derivative of such a gas, including ethylene, propylene, butadiene, benzene, toluene, xylene, ammonia, methanol, and urea.”²²⁷

Suppose Iran produced ammonia for use in household cleaning solutions, or urea as a component in agricultural fertilizer. Suppose, further, a British firm making such solutions, or a Swiss company producing fertilizer, bought the component petrochemicals from Iran. If the fair market value of their purchases exceeded U.S. \$250,000 (or \$1 million annually), then Congress forbade them.²²⁸

As this hypothetical example illustrates, this prohibition meant persons in third countries could not source petrochemical inputs – sometimes called “feedstock” – from Iran. In turn, Iran, even if it could develop the feedstock, would have a difficult time finding foreign markets for it if persons in those markets complied with the sanctions.

5. Prohibition Against Transporting Crude Oil from Iran²²⁹

Shipping crude oil out of Iran certainly could help Iran develop both its petroleum resources and ability to obtain gasoline. Presumably, Congress meant

²²⁴ See *id.* § 5(a)(4)(A)(i), reprinted in 2013 COMPILATION, *supra* note 11, at 690.

²²⁵ See *id.* § 5(a)(4)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 690.

²²⁶ Compare Iran Sanctions Act of 1996 § 5(a), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1135-37, with Iran Sanctions Act of 1996 § 5(a)(6), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 691.

²²⁷ See Iran Sanctions Act of 1996 § 14(16), amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 707.

²²⁸ *Id.* § 5(a)(6)(A)(i)-(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 691.

²²⁹ Compare Iran Sanctions Act of 1996 § 5(a), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1135-37, with Iran Sanctions Act of 1996 § 5(a)(7), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 691-92.

to bar such shipments under its 1996 and 2010 legislation, but with major oil importers like China, India, and Japan dependent on foreign – including Iranian – crude, ferrying oil out of Iran persisted. With its 2012 changes, Congress made clear it wanted them to cease such transportation by targeting not just persons in the importing countries, but also the shippers themselves.

Carriage companies thus found themselves in the sight line of Congress: anyone who was a “controlling beneficial owner,” or who otherwise owned, operated, controlled, or insured a vessel used to transport crude oil from Iran to any other country in the world, was liable.²³⁰ Congress allowed a small safe harbor for underwriters or insurers that “exercised due diligence” to ensure the persons for which they were providing protective policies were not shipping from Iran.²³¹

Interestingly, for this particular prohibition, Congress limited the circumstances in which sanctions could be imposed in three ways. First, Congress bifurcated the *mens rea* requirement: a “controlling beneficial owner” had to have “actual knowledge” of the use of their vessel, whereas for all other owners, operators, controllers, or insurers, actual or constructive knowledge (“knew or should have known”) was sufficient.²³² This adjustment made it more difficult to impose sanctions on controlling beneficial owners, but easier on all others involved in shipping crude oil from Iran. Why Congress chose to do so is unclear, if its goal was to tighten sanctions unreservedly.

Second, sanctions were inapplicable if the President determined that a third country to which Iranian crude oil was shipped had an “[in]sufficient supply or petroleum and petroleum products” of non-Iranian origin.²³³ Congress apparently appreciated that some third countries could not easily or swiftly substitute their supply sources for Iran, so it did not want to impose sanctions on transporting Iranian crude to them unless they could “reduce significantly their purchases from Iran.”²³⁴

Third, sanctions also were inapplicable to any foreign financial institution from a country that had “significantly reduced its volume of crude oil purchases from Iran.”²³⁵ This limitation, linked to the 2012 National Defense Authorization Act (discussed below), referred to successive 180-day periods in which the President must report on the extent to which third countries were complying with sanctions against transactions with the CBI and Iranian financial

²³⁰ Iran Sanctions Act of 1996 § 5(a)(7)(A)(i), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 691.

²³¹ *See id.* § 5(a)(9), *reprinted in* 2013 COMPILATION, *supra* note 11, at 693.

²³² *Id.* § 5(a)(7)(A)(ii)(I)-(II), *reprinted in* 2013 COMPILATION, *supra* note 11, at 691.

²³³ *Id.* § 5(a)(7)(B)(i), *reprinted in* 2013 COMPILATION, *supra* note 11, at 691.

²³⁴ *Id.*

²³⁵ National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(4)(D), 22 U.S.C. § 8513a(d)(4)(D); Iran Sanctions Act of 1996 § 5(a)(7)(B)(ii), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 691-92.

institutions. Essentially, a country had six months to reduce its dependence on Iranian crude oil; otherwise, its banks could be targeted for sanctions.

6. Prohibition Against Concealing Iranian Origin of Crude Oil or Refined Petroleum Products²³⁶

Any person determined to skirt the American prohibition against shipping crude oil or refined petroleum from Iran would find smuggling to be an obvious, albeit wicked, solution. Setting moral or reputational concerns aside, a prospective smuggler might balance reward against risk to calculate whether concealing the true origin of energy resources it transports is worthwhile. As sanctions tightened around Iran, the price of those resources would rise. Depending on how high the price rose, the potential reward for shipping Iranian crude oil or refined petroleum products, disguised as originating elsewhere, could offset the expected value (i.e., probability of imposition multiplied by dollar value of penalty) of any sanction.

To deter smuggling, Congress made concealment itself a sanctionable offense.²³⁷ In doing so, it was not breaking new legal ground; accurate country of origin reporting is required under United States Customs Law. But what was novel was – again – the extraterritorial reach of the sanction. It now was illegal to falsely report the true Iranian origin of crude oil or refined petroleum products, regardless of the recipient of the report. Whether the products were American or foreign was irrelevant; it was the act of concealment that mattered.

Congress applied the prohibition against concealing Iran as the country of origin of crude oil or refined petroleum products coextensively with the prohibition against transporting crude oil: it applied to any person that was “a controlling beneficial owner” of, or that “otherwise owns, operates, or controls,” a vessel used to transport Iranian energy resources.²³⁸ It used the same bifurcated *mens rea* requirement – “actual knowledge” to the first group, and “knowingly” (i.e., actual or constructive knowledge) for the second group – as before. And, as before, it granted a small safe harbor to underwriters or insurers if they “exercised due diligence” to ensure the persons for which they were providing protective policies were not transporting energy products out of Iran.²³⁹

Two points are noteworthy. First, lest prospective smugglers have any doubt as to whether American legislators were aware of how they might conceal what they were transporting, Congress listed two non-exclusive examples of

²³⁶ Compare Iran Sanctions Act of 1996 § 5(a), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1135-37, with Iran Sanctions Act of 1996 § 5(a)(8), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 692-93.

²³⁷ See Iran Sanctions Act of 1996 § 5(a)(8), amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 692.

²³⁸ *Id.* § 5(a)(8)(A), reprinted in 2013 COMPILATION, *supra* note 11, at 692.

²³⁹ See *id.* § 5(a)(9), reprinted in 2013 COMPILATION, *supra* note 11, at 693.

sanctionable behavior: allowing the vessel operator to disable the satellite tracking device on the vessel, or obscuring the fact that the vessel is owned, operated, or controlled by the Iranian government, National Iranian Tanker Company (NITC), or Islamic Republic of Iran Shipping Lines (IRISL) (or by entities controlled by them).²⁴⁰ Moreover, a prospective smuggler was deemed to have “actual knowledge” that Iran, the NITC, or IRISL had an interest in a vessel if OFAC listed the International Maritime Organization (IMO) of that vessel.²⁴¹ In effect, if OFAC published the IMO number of the vessel, then every person, regardless of location, was deemed to know that the vessel was Iranian, and use of it to ship crude oil or petroleum products out of Iran was barred.

Second, lest prospective smugglers have any doubt as to how serious Congress was in its intention to ensure countries of origin of crude oil and refined petroleum products were reported accurately and transparently, it empowered the President to impose a supplemental sanction on them.²⁴² In addition to choosing and applying five of nine sanctions from the standard menu, the President could impose a sixth punishment, namely, on the vessel used to ship Iranian energy resources – a ban. The President could bar that vessel from landing at any American port for up to two years.

The prohibition against smuggling adduced two other dimensions of the sanctions amendments wrought by the 2012 Iran-Syria Act. First, Congress effectively widened the ban on FDI in the Iranian energy sector and trade in Iranian energy products to a ban on cargo ships in which Iran had an interest. Doing so was consistent with the 2010 CISADA expansion of sanctions from the petroleum sector *per se* to downstream products, namely, refined petroleum. (That same kind of expansion is seen below with respect to allied services such as financing and insurance.)

Second, Congress anticipated how particular prohibitions might be violated, and tried to block such moves. Doing so was consistent with the 2010 CISADA expansion of sanctions from FDI to exportation and importation, and with the 2012 Iran-Syria Act’s further expansion to JVs. In brief, the unmistakable trend was one from an initial narrow definition, targeting one product’s category and behavior, to downstream products, supporting services, and anticipated reactions by would-be wrongdoers.

In sum, the 2012 Iran-Syria Act amendments to the 1996 sanctions regime, as amended by the 2010 legislation, were breathtaking. America closed loopholes quite literally to strangle the Iranian energy sector, and did so in the most extraterritorial of manners.

²⁴⁰ See *id.* § 5(a)(8)(A)(i)-(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 692.

²⁴¹ See *id.* § 5(a)(8)(C)(i)-(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 692-93.

²⁴² See *id.* § 5(a)(8)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 692.

C. 2nd: Barring Transshipment of Military Items

The 2012 Iran-Syria Act rewrote the prohibition in the 1996 Iran Sanctions Act aimed at preventing Iran from obtaining a WMD. The 1996 Act, coupled with the 2010 CISADA amendments, barred knowing exportation of goods, services, or technology that would contribute materially to the ability of Iran to obtain a WMD or destabilizing numbers of advanced conventional weaponry. That prohibition left open three loopholes: transshipment, constructive knowledge, and JVs in uranium mining. Congress closed them with the 2012 Act.²⁴³

First, any “person” that “exported or transferred, or *permitted or otherwise facilitated the transshipment* of, any goods, services, technology, or other items to *any other person*” now was liable.²⁴⁴ Second, actual knowledge was not necessary; constructive knowledge – that a person “should have known” – was enough.²⁴⁵ Of what did a person need actual or constructive knowledge? Two points: first, that the export, transfer, or transshipment to another person “would likely result” in that other person exporting, transferring, or transshipping prohibited items to Iran, and second, that the result “would contribute materially to the ability of Iran” to develop WMDs or destabilizing numbers of advanced conventional weapons.

To be clear, closing the first two loopholes meant:

- (1) A person need not ship forbidden items directly to Iran. Shipping them through one or more intermediaries was enough. For example, a person in Belarus could export such items to another person in Singapore. If that other person in Singapore subsequently transferred the items to Iran, directly or through another stage of transshipment, for example, through Yemen, then liability could attach to the first person, and indeed every person in the transactional chain.
- (2) The first person in the chain need not know for sure that the second or a subsequent person is sending the forbidden items onward to Iran. If that person ought to have known the next or a subsequent person likely would send the items to Iran, then that rather speculative anticipation was enough. Presumably, constructive knowledge would exist if the first person should have known the goods, services, technology, or other items at issue were headed to Dubai, and that

²⁴³ Compare Iran Sanctions Act of 1996 § 5(b), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1138-39, with Iran Sanctions Act of 1996 § 5(b), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 693-95.

²⁴⁴ Iran Sanctions Act of 1996 § 5(b)(1)(A), amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 693.

²⁴⁵ *Id.* § 5(b)(1)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 693.

Dubai was a prominent location for smuggling items in small vessels across the Gulf to Iran.

- (3) As for the second of the two *mens rea* elements – actual or constructive knowledge that the items “would contribute materially” to Iran’s weapons programs – there was no need for a person to have detailed knowledge of those programs. Rather, that knowledge presumably could be inferred from the nature of the goods, services, technology, or items that were exported, transferred, or trans-shipped. For example, if the goods were centrifuges for enriching uranium, or the technology was used for drones, then could there be doubt that the contribution would be material?

Yet, even with these changes, arguably, a rather large and threatening loophole remained: a person might not ship or transship anything to Iran, but might engage in a JV that involves mining, producing, or transporting uranium. Would that participation be sanctionable?

Even reading the amended statutory language broadly, with the closure of the first two loopholes, the answer was “no.” Uranium is a “good,” but helping to mine or produce it is not the same as “exporting,” “transferring,” or transshipping it.” For example, a person could simply assist in removal of uranium from Russia, even in partnership with an Iranian government entity or person connected to that entity. If the first person did no more, then it did not engage in a prohibited transaction. (Note the person did not invest in Iran, much less in the petroleum resources sector of Iran.) Yet, if the uranium mined in Russia found its way to Iran, then surely Iran’s ability to construct a nuclear weapon would be enhanced.

So, with the 2012 Iran-Syria Act, Congress closed this loophole. Any person, anywhere in the world, was barred from participating in a JV “that involve[d] *any activity* relating to the mining, production, or transportation of uranium” with (1) the government of Iran, 2) an entity incorporated in or subject to the jurisdiction of Iran, or (3) a person acting on behalf of, at the direction of, or owned or controlled by that government or such an entity.²⁴⁶ The *mens rea*

²⁴⁶ *Id.* § 5(b)(2)(A)(i), reprinted in 2013 COMPILATION, *supra* note 11, at 693-94. Note this proscription applied on or after February 2, 2012. Before that date, an additional set of criteria applied: the uranium had to be transferred directly or indirectly to Iran, the Iranian government had to receive “significant revenue,” or Iran could have obtained technology or equipment it did not previously have that could have contributed materially to it developing nuclear weapons. *See id.* § 5(b)(2)(A)(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 694. This prohibition and attendant sanctions thus applied retroactively, unless a person agreed to terminate its JV participation within 180 days of enactment of the Iran-Syria Act. *See id.* § 5(b)(2)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 694.

The other aspects of the prohibition against helping Iran obtain WMDs or destabilizing numbers of advanced conventional weapons remained the same, namely, the statutory provisions concerning the additional mandatory sanction, and the exception thereto, about export licensing. *Compare* Iran Sanctions Act of 1996 § 5(b)(2), *amended by*

requirement, “knowingly,” covered actual or constructive knowledge.²⁴⁷ So, for example, Rio Tinto Zinc, the Australian mining multinational corporation, could not participate in a JV with Tata Mining, the Indian natural resources company, if Tata had an understanding with a business association located in Tehran, and that JV engaged in manufacturing apparel to protect mining workers against radiation. After all, tracking the statutory language, making such apparel is an “activity” that “relat[es] to” uranium mining.

Here again, it is worth reminding that in closing all three loopholes, Congress again asserted its extraterritorial reach. None of the persons in the transactional chain, or a JV, needed to be American or anywhere close to the homeland.

CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1138-39, *with* Iran Sanctions Act of 1996 § 5(b)(3), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 694-95.

²⁴⁷ Iran Sanctions Act of 1996 §§ 5(b)(2)(A), 14(13), *amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 693.

D. 3rd: Government Procurement Certification Against Revolutionary Guards

The 2012 Iran-Syria Act also ushered in a notable change to government contracting certifications.²⁴⁸ Any prospective contractor for the United States government was obligated not only to certify it was not engaging in a prohibited activity (as before), but also that it was not “knowingly” involved in a “significant transaction” with Iran’s Revolutionary Guard Corps.²⁴⁹ This certification extended to any officials, agents, or affiliates of the Guard, the property or interest in property of which were blocked by the United States under the IEEPA. False certification was punishable by exclusion from the list of approved government contractors (again, as before) for at least two years (a curious decrease from three years).²⁵⁰

The additional certification rule, while seemingly minor, reflected a continuation of the earlier shift in American sanctions policy. Up until the 2010

²⁴⁸ Compare Iran Sanctions Act of 1996 § 6(b), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1142-43, with Iran Sanctions Act of 1996 § 6(b), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 698-700.

The basic requirement concerning Iran certifications relating to section 5 prohibitions remained the same, but with minor renumbering. Compare Iran Sanctions Act of 1996 § 6(b)(1), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1142, with Iran Sanctions Act of 1996 § 6(b)(1)(A), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 698-99.

Likewise, clarifications regarding certain products, the rule of construction, and waivers were unchanged. Compare Iran Sanctions Act of 1996 § 6(b)(3)-(5), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1143, with Iran Sanctions Act of 1996 § 6(b)(3)-(5), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 699-700.

The definition of “executive agency” stayed the same, and to it, the 2012 Act added a definition of “federal acquisition regulation.” Compare Iran Sanctions Act of 1996 § 6(b)(6), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1143, with Iran Sanctions Act of 1996 § 6(b)(6)(A)-(B), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 699-700. The 2012 Act amended the provisions on applicability to reflect its certification requirement against dealing with the Guards. Compare Iran Sanctions Act of 1996 § 6(b)(7), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1143, with Iran Sanctions Act of 1996 § 6(b)(7)(A)-(B), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 699-700.

²⁴⁹ Iran Sanctions Act of 1996 § 6(b)(1)(B), amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 699.

²⁵⁰ Compare Iran Sanctions Act of 1996 § 6(b)(2)(A)-(B), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1138-39, with Iran Sanctions Act of 1996 § 6(b)(2)(A)-(B), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 699-700.

CISADA, and aside from IEEPA asset freezes, the United States had not focused on targeting the Guard. Prohibited transactions took aim at economic sectors of Iran, especially petroleum and refined gasoline, not necessarily at economic agents within Iran. From an American perspective, the problem with looking at transactions, not transactors, was that the Guard actually controlled (directly or indirectly) businesses in Iran. Moreover, the Guard was politically powerful, and close to the Supreme Leader. Consequently, the 2012 Iran-Syria Act certification requirement was a step toward weakening the Guard as an anti-American economic and political force.

E. 4th: Diversion Prohibition

Pursuant to CISADA, America had a trade embargo against Iran, and a humanitarian exception thereto.²⁵¹ Unscrupulous individuals, in public and private areas, sometimes exploited such an exception for their own benefit. They diverted goods, such as food and medicine, or they misappropriated the proceeds from the sale or resale of the excepted goods. The embargo did not expressly prohibit these corrupt behaviors. The 2012 Iran-Syria Act closed this loophole.

The Act directed the President to submit to the appropriate congressional committees a list of persons he determined had channeled goods (be they food, medicine, or other humanitarian items) intended for the Iranian people away from them, or made off with funds from their sale or resale.²⁵² Here, too, there was no intent requirement – the offense was a strict liability one. The Act then required the President to impose punishment upon those persons that were applicable to human rights abusers (except, logically, for the sanction of forbidding importation of goods, as that would be counter-productive to the aim of humanitarian goods reaching needy Iranians).²⁵³ The fact that diverting goods was a strict liability offense made sense, because at issue was corruption interfering with aid reaching the Iranian people, and thus undermining any pretense that the punishments targeted bad actors, not innocent civilians.

²⁵¹ See CISADA § 103(a), (b)(1)(A), (b)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 708-09.

²⁵² See *id.* § 105C(b)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 715; Iran Freedom Support Act, Pub. L. 109-293, § 1249, 120 Stat. 344-50 (2006), *reprinted in* 2013 COMPILATION, *supra* note 11, at 748.

²⁵³ See CISADA § 105C(a)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 715; Iran Freedom Support Act § 1249, *reprinted in* 2013 COMPILATION, *supra* note 11, at 748.

F. 5th: Shipping and Insurance Prohibition

None of the aforementioned constrictions affected carriage of goods to or from Iran if those goods were unrelated to the energy sector. However, what if a shipping company provided a vessel used to transport goods to Iran on which Iran could use to acquire WMDs or support terrorists? Centrifuges and rocket-propelled grenades (RPGs) would be quintessential examples, and perhaps a state-owned Chinese freight company, such as the Chinese Ocean Shipping Company (COSCO) or China Shipping Container Lines (CSCL), might carry them from their port of origin to Bandar Abbas.²⁵⁴ Similarly, suppose P&I Clubs or Munich Re provided marine cargo insurance or reinsurance for the transportation of these items.²⁵⁵

To discourage the likes of COSCO and CSCL, and non-state owned enterprise (SOE) carriage companies, from shipping goods to Iran, the 2012 Iran-Syria Act rendered them liable for any “knowing” (that is, actual or constructive knowledge) sale, lease, or provision of a vessel used to carry “to or from Iran . . . goods that could materially contribute to” the WMD or terrorist activities of Iran.²⁵⁶ Likewise, the Act sought to bar financial institutions, indeed, any person, from providing marine cargo insurance for transporting the forbidden merchandise to Iran.²⁵⁷ So expansive was the prohibition that it covered “any other shipping service.”²⁵⁸ Hence, supplying merchant marine crews, catering, or sanitation, or possibly even tugboat assistance, was barred. Ironically, pre-shipment inspection (PSI) services might even be ensnared in this phraseology.

Any “person,” American or otherwise, legal or natural, was potentially liable, as was any person in a position of ownership, control, or common ownership control.²⁵⁹ The sanction was a blocking one: the United States would

²⁵⁴ See *List of Freight Ship Companies*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_freight_ship_companies (last visited Mar. 15, 2014).

²⁵⁵ These companies are among the top insurers in the world. See *Top 10 Insurance Players*, LLOYD’S LIST INTELLIGENCE, <http://www.lloydslist.com/ll/news/top100/insurance/> (last visited Feb. 20, 2014).

²⁵⁶ Iran Threat Reduction and Syria Human Rights Act of 2012 § 211(a), 22 U.S.C. §§ 8711, 8721-24, 8741-44, 8781, *reprinted in* 2013 COMPILATION, *supra* note 11, at 724. In respect of the definition of “knowing,” see Iran Sanctions Act of 1996 §§ 5(b)(2), 14(13), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 693, 706.

²⁵⁷ Iran Threat Reduction and Syria Human Rights Act of 2012 § 211(a), *reprinted in* 2013 COMPILATION, *supra* note 11, at 724.

²⁵⁸ *Id.*

²⁵⁹ *Id.*; see also *id.* § 211(e), *reprinted in* 2013 COMPILATION, *supra* note 11, at 725 (containing a rule of construction to ensure section 211 does not restrict the authority of the President under the IEEPA to sanction a person). The mens rea requirement for owners or controllers was “actual knowledge or should have known,” and for a one owned, controlled by, or under common ownership of the primary person was “knowing[] engage[ment]” in the provision of a vessel, marine insurance, or other shipping service. *Id.* § 211(b)(2)(C), *reprinted in* 2013 COMPILATION, *supra* note 11, at 725.

forbid any transaction in the property or interests of that person on which it could lay hands. So, for instance, a COSCO or CSCL vessel in the port of Baltimore might be seized, or accounts of P&I Clubs or Munich Re in New York might be frozen. Even the assets of companies that hired workers from impoverished towns and villages in developing countries, such as Magsaysay, a Philippine provider of (*inter alia*) shipping personnel from captains to bakers, were at risk.²⁶⁰ A Presidential waiver was possible, but only if it was “vital to the national interests” of the United States, and the President explained his decision to Congress.²⁶¹

Notably, however, the sanction was different if the National Iranian Oil Company (NIOC) or National Iranian Tanker Company (NITC) was involved. Suppose P&I Clubs or Munich Re underwrote insurance (or reinsurance) for the NIOC or NITC. Then the insurer would be subject to five of the nine sanctions (discussed below).²⁶² The tough insurance penalties, apparently, were premised on the view that NIOC and NITC were directly engaged in helping Iran obtain revenues for its petroleum and petroleum resources that Iran funneled to WMD and terrorist activities. Only if P&I Clubs or Munich Re exercised due diligence to avoid underwriting policies for NIOC or NITC, or if their policies were for shipments of food, medicine, or humanitarian assistance, could they escape sanctions.²⁶³

To be sure, it remained lawful to carry or insure goods, or give shipping services for, transportation between Iran and third countries not related to these activities. But doing so meant freight companies had to ascertain what truly was inside the containers on vessels they provided. That meant more rigorous inspections, which drove up shipping costs to Iran. The possibility of mishaps, coupled with the threat of American penalties, pressed up insurance premiums. Why bother with the headaches, transactions costs, and risks associated with compliance? Perhaps it was better not to carry or insure, or give attendant shipping services for, goods to or from Iran. That would be an outcome Congress

²⁶⁰ See generally MAGSAYSAY, www.magsaysay.com.ph (last visited Apr. 4, 2014); *Magsaysay Maritime Corporation*, WORKABROAD.PH, www.workabroad.ph/list_specific_jobs.php?by_what=agency&id=2459 (last visited Apr. 4, 2014) (providing available jobs for the Magsaysay corporation).

²⁶¹ Iran Threat Reduction and Syria Human Rights Act of 2012 § 211(c)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 724. In this instance, vessel operators or others conducting or facilitating “significant financial transactions with persons managing ports in Iran” were also subject to reporting every ninety days. *Id.* § 211(d)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 725. Such reports could contain a classified Annex. See *id.* § 211(d)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 725.

²⁶² *Id.* § 212(a), *reprinted in* 2013 COMPILATION, *supra* note 11, at 725.

²⁶³ *Id.* § 212(b)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 725-26. If an insurer (or reinsurer) already had been underwriting policies for the NIOC or NITC, then it could escape sanctions by terminating its provision of those services to them. See *id.* § 212(b)(3), *reprinted in* 2013 COMPILATION, *supra* note 11, at 726; see also *id.* § 212(e), *reprinted in* 2013 COMPILATION, *supra* note 11, at 726-27 (containing a rule of construction to ensure section 211 does not restrict the authority of the President under the IEEPA to sanction a person).

would approve of, as it would turn the de jure American trade embargo against Iran into a de facto global trade ban.

G. 6th: Sovereign Debt Prohibition

Continuing its efforts to ostracize Iran from the world of international finance, Congress moved to deny Iran access to sovereign debt markets. Congress identified sovereign debt as potential assistance to the energy sector of Iran. Central and sub-central governments around the world issue debt to finance infrastructure development projects. In the case of Iran, FDI projects valued above a defined threshold in the energy sector had been illegal since 1996, but Iran could finance them by tapping financial markets outside of the United States. Simply put, Iran could substitute portfolio for direct investment. To the extent Iran did so, it could funnel the consequent revenues from successful energy projects toward production of a nuclear bomb or support for *Hezbollah*.

Congress endeavored to choke off this source of funds by making it illegal to buy, subscribe to, or otherwise facilitate in the issuance by the Iranian government bonds or other debt instruments.²⁶⁴ This move exerted bold extraterritorial force over world financial markets: no person, wherever located, could purchase, or even clear or settle trades, in Iranian sovereign debt. Where that potential investor was located, the financial market or markets on which Iran attempted to float its bonds, or the place at which its debt instruments were cleared and settled, did not matter. Of importance was whether the person acted “knowingly,” i.e., with active or constructive knowledge that the debt was that of the Iranian government or any entity, such as an SOE, owned or controlled by it.²⁶⁵ If the President found a person violated this prohibition, then he had to impose five of nine sanctions (discussed below) on that violator.

So, for instance, suppose a prominent hedge fund, such as Apollo Management Asia Pacific Limited, based in Hong Kong,²⁶⁶ invested in an over-the-counter (OTC) issuance or private placement of convertible bonds by the NIOC. The bonds are denominated in *euro*. The Spanish bank, Santander, underwrites the offering.²⁶⁷ Would the fact that Apollo and Santander are not United States persons immunize them from liability? Would the fact that the bonds are not denominated in dollars, or that they may be converted to equity,

²⁶⁴ Iran Sanctions Act of 1996 § 5(a)(3)(B)(v), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 689.

²⁶⁵ Iran Threat Reduction and Syria Human Rights Act of 2012 § 213(a)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 727.

²⁶⁶ *See generally* APOLLO GLOBAL MGMT., <http://www.agm.com/Home.aspx> (last visited Feb. 17, 2014) (discussing the activities and locations of the hedge fund).

²⁶⁷ *See generally* SANTANDER BANK, <https://www.santanderbank.com/us/> (last visited Feb. 16, 2014) (discussing the activities and locations of the bank).

matter? Would the fact that the transaction is not conducted on an organized exchange, and performed entirely overseas, matter?

The answer to these questions is “no”: nothing on the face of the pertinent statute circumscribed the prohibition and attendant sanctions in accordance with these facts. Similarly, whether the investors in Apollo were high net worth Americans would be immaterial. To the contrary, the reality that Apollo and Santander have offices in New York, and Apollo surely has American investors, renders them and their assets vulnerable.

H. 7th: Affiliates Prohibition

Thanks to CISADA, assets of Iran’s Revolutionary Guard Corps to which the United States could obtain jurisdiction were frozen. But, what about foreigners, especially non-Iranians, who operated as agents for the Guard? What if they entered into energy or financial transactions with the Guard, or bartered deals for the Guard that did not involve a monetary payment? CISADA did not directly target these aiders and abettors, nor put their assets at risk, and did not cover counter-trade. The 2012 Iran-Syria Act addressed these questions, while maintaining the extant primary sanctions on the Guard.²⁶⁸

First, the Act closed the loophole by which a foreigner could help the Guard with impunity.²⁶⁹ Congress directed the President to identify and designate for sanctions any foreign person who was an “official[], agent[], or affiliate[]” of the Guard and to “block and prohibit all transactions in all property and interests in property of that foreign person” that were in the United States or in the possession or control of a United States person.²⁷⁰ Likewise, the President was to deny entry of a Guard agent into the United States (unless that agent was coming to speak at the United Nations, or it was “vital to . . . [American] national security interests” to permit him entry).²⁷¹

Read literally, this language could apply to a salesperson for Nestlé who sold baby formula to the spouse of an official in the Guard. To screen out inconsequential agency relationships, Congress conveyed to the President the

²⁶⁸ Iran Threat Reduction and Syria Human Rights Act of 2012 § 301(d)-(f), *reprinted in* 2013 COMPILATION, *supra* note 11, at 729-30.

²⁶⁹ *Id.* § 301, *reprinted in* 2013 COMPILATION, *supra* note 11, at 728-30.

²⁷⁰ *Id.* § 301(a)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 729.

²⁷¹ *Id.* § 301(d)-(e), *reprinted in* 2013 COMPILATION, *supra* note 11, at 729-30. The first exception was needed if the United States was to comply with its United Nations treaty obligation, namely, the June 26, 1947 Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, which entered into force on November 21, 1947. *See* Iran Threat Reduction and Syria Human Rights Act of 2012 § 301(d)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 730. Invocation of the second exception required a Presidential report to the appropriate congressional committees, which could contain a classified Annex. *Id.* § 301(e)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 730.

agents in which it had special interest: the President was to give priority in investigation to those persons who conducted, or tried to conduct, a “sensitive transaction” with the Guard.²⁷² “Sensitive transactions” meant (exclusively) any (1) financial deal involving a non-Iranian bank in excess of U.S. \$1 million (or summing above that threshold in a 12-month period); (2) manufacture, importation, or exportation of items Iran needed to develop a WMD; (3) production, purchase, or sale of any goods, services, or technology relating to the Iranian energy or petrochemical sector; or (4) procurement of restricted technology that would aid Iran in restricting the flow of news or expression of free speech.²⁷³ Thus, respectively, a bank account manager in a Malaysian bank who provided investment advice, a mine director in Russia who supervised the extraction of uranium, a port official in Rotterdam who oversaw shipments of crude oil, or an engineering professor at the University of Kansas who conducted research into plastics — all were potentially liable for violations of the agency prohibition if their dealings involved the Guard and the President identified them as “officials, agents, or affiliates” of the Guard.²⁷⁴

Significantly, Congress wrote the prohibition expansively to include another step downstream in the chain of a financial or commercial transaction. Suppose a foreign person “knowingly materially assist[s]” the Guard, or an agent or affiliate thereof who has been sanctioned, by providing funds, goods, services, or technology to Guard officials or agents.²⁷⁵ For example, suppose a Dutch commodities trader at ABN AMRO in Amsterdam brokers a sale of liquefied petroleum gas (LPG) by NatGaz, which is headquartered in Beirut, to the Bangkok office of the United Kingdom-based ITS Trading Company.²⁷⁶ If the President has sanctioned ITS Bangkok as a Guard agent, then the broker potentially is liable for having materially assisted the agent by arranging the sale of goods (LPG) and concomitant payment of funds.²⁷⁷

Likewise, suppose a foreign person enters into a “significant transaction” with the Guard or one of its affiliates.²⁷⁸ For instance, suppose a Singaporean businessman brokers an exchange of basmati rice from India for Iranian crude oil. The businessman is potentially liable, because “significant transaction” includes

²⁷² *Id.* § 301(b)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 729.

²⁷³ Iran Threat Reduction and Syria Human Rights Act of 2012 § 301(c)(1)-(5), *reprinted in* 2013 COMPILATION, *supra* note 11, at 729; *see also* CISADA § 106(c), 22 U.S.C. § 8515(c) (concerning the last defined type of “sensitive transaction”).

²⁷⁴ *See* Iran Threat Reduction and Syria Human Rights Act of 2012 § 301(a)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 729.

²⁷⁵ *Id.* § 301(a)(1)(A), *reprinted in* 2013 COMPILATION, *supra* note 11, at 730.

²⁷⁶ *See* ABN-AMRO GRP., <http://www.abnamro.com/en/index.html> (last visited Feb. 17, 2014); NATGAZ, <http://www.natgaz.com.lb/aboutus.aspx?aspxerrorpath=/default.aspx> (last visited Feb. 17, 2014); ITS TRADING CO., <http://www.itstradingcompany.com> (last visited Feb. 17, 2014).

²⁷⁷ Iran Threat Reduction and Syria Human Rights Act of 2012 § 302(b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 731.

²⁷⁸ *Id.* § 302(a)(1)(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 730.

barter trade involving the Guard or its network, assuming the President designated and sanctioned him as an affiliate.²⁷⁹

In sum, the affiliate prohibition was up to two steps removed from the Guard: it extended not only to (1) the agent, but also to (2) any foreign person who supports that agent. In both hypothetical transactions, the statutory language did not require that the Guard itself buy the LPG or sell the crude oil. And, in both cases, the mandatory penalty was imposition of five from the standard menu of nine sanctions (discussed below).²⁸⁰ Sanctions on the foreign person-supporter could not be waived unless that person had ceased the forbidden behavior, or a waiver was “essential” to American national security interests, and would not terminate until the person stopped the behavior and gave assurances against re-engagement.²⁸¹

In this two-step chain, foreign agents or supporters of the Guard the President had to identify and punish were not limited to private natural or legal persons, but public sector bodies were also included. Congress made sure in the 2012 Iran-Syria Act to forbid any foreign government agency of any country in the world from transacting with the Guard or its agents. That is, suppose the President determined a third-country government entity: “[K]nowingly and materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, or knowingly and materially engaged in a significant financial transaction with” a foreign person, and that this person was an “official, agent, or affiliate” of the Guard.²⁸² Then, the entity was potentially liable.

To illustrate via modest modifications to the above hypotheticals, suppose the Dutch Ministry of Finance renders advisory services to the ABN AMRO trader on the application of bank secrecy laws to commodity brokerage, or the Ministry of Commerce in India lends support in the form of material and technology on the proper conduct of barter trade to the Singaporean businessman broker. Assuming the trader or broker qualifies as Guard agents or affiliates, then the Dutch and Indian government bodies could be held to account.²⁸³

Sanctions on those sovereign bodies were not mandatory, but Congress clearly nudged the President to enforce them by listing the possible punishments:

²⁷⁹ *Id.* § 302(a)(1)(B), (a)(3), (b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 730-31.

²⁸⁰ *Id.* § 302(b)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 731.

²⁸¹ *Id.* § 302(b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 731; *see also id.* § 302(e), *reprinted in* 2013 COMPILATION, *supra* note 11, at 732 (concerning waiver of Presidential identifications and designations of foreign person-supporters on the ground of “damage” to national security).

²⁸² Iran Threat Reduction and Syria Human Rights Act of 2012 § 303(a)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 732. Culpability also could arise if the foreign person was subject to financial sanctions under pertinent United Nations Security Council Resolutions. *See id.* § 303(a)(2)(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 732-33.

²⁸³ *See id.* § 303(a)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 733.

denial of foreign aid, defense assistance, and financial or credit support; rejection of export licenses for controlled items (in particular, weapons); opposition to official international financial institution lending and technical assistance; and IEEPA penalties.²⁸⁴ Once imposed, sanctions could be terminated only if doing so was “essential” to United States national security, the foreign government entity ceased its behavior, or the foreign person with whom or which it dealt no longer acted for Iran’s Revolutionary Guard Corps.²⁸⁵ Congress further indicated its preference for sanctions against foreign government agencies that transacted with the Guard or its supporters by obliging the President to explain to it why he opted (if he did) for clemency.²⁸⁶ Manifestly, then, Congress sought to isolate the Guard as much as possible by telling the private and public sectors around the world not to deal with them or their affiliates.

I. 8th: Tightening Human Rights and Censorship Prohibitions

The 2012 Iran-Syria Act amended the 2010 CISADA rules on human rights abuses. Those rules directed sanctions against individual Iranian officials for disrespecting the human rights of Iranians during and after the Green Revolution. But who, specifically, were those officials? Moreover, should not the supply to Iran of the physical instruments of torture and devices for censorship be forbidden? Finally, ought not the faceless transferors, sometimes white-collar professionals, who gave torturers and censors their tools, be held accountable?

CISADA did not answer these three questions. The Act essentially closed the loopholes by naming names and establishing as prohibited behaviors the shipment of those heinous tools.²⁸⁷ First, Congress stated its sense that:

[T]he Supreme Leader of Iran, the President of Iran, senior members of the Intelligence Ministry of Iran, senior members of Iran’s Revolutionary Guard Corps, Ansar-e-Hezbollah and Basij-e-Mostaz’afin, and the Ministries of Defense, Interior, Justice, and Telecommunications are ultimately responsible for ordering, controlling, or otherwise directing a pattern and

²⁸⁴ *Id.* § 303(b)(1)(A)-(G), *reprinted in* 2013 COMPILATION, *supra* note 11, at 733-34; *see also id.* § 304, *reprinted in* 2013 COMPILATION, *supra* note 11, at 735 (containing a rule of construction against limiting Presidential authority to impose sanctions under the IEEPA).

²⁸⁵ *Id.* § 303(c)(1)-(3), *reprinted in* 2013 COMPILATION, *supra* note 11, at 734.

²⁸⁶ *See id.* § 303(d), *reprinted in* 2013 COMPILATION, *supra* note 11, at 734. Reporting was to be to all House and Senate Committees with jurisdiction over foreign relations, appropriations, financial institutions, armed services, and intelligence. *See id.* § 303(e)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 734-35.

²⁸⁷ *See* CISADA §§ 105A(a)-(b), 105B(a)-(b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 713-15.

practice of serious human rights abuses against the Iranian people²⁸⁸

Thus, the President “should” include those people on the CISADA list of human rights violators.²⁸⁹ To be sure the President understood what “should” meant, Congress ordered a “detailed report” to the appropriate committees on whether each named person was on the blacklist, and if not, why not.²⁹⁰

Second, the amended statute directed the President to provide (and regularly update) the appropriate congressional committees with the name of any person the President thinks “knowingly engaged” in transferring (or facilitating the transfer) to Iran, or any Iranian, “goods or technologies he decides are likely to be used by Iran to commit serious human rights abuses against the people of Iran.”²⁹¹ Whether it was “likely” an item would be put to abusive use or whether an abuse was “serious” might be unclear.

But, lest the President doubt what Congress intended with respect to “goods or technologies,” the legislature provided him with a non-exclusive list of examples: ammunition, batons, electroshock weapons, firearms, rubber bullets, spray (chemical or pepper), stun grenades, surveillance technology, tear gas, and water cannons.²⁹² So, for instance, dual use items such as pepper spray, which some American runners carry for protection while training, was off limits. The list was non-exclusive, as it had to be: an evil mind can turn everyday items like cigarettes or pliers into an instrument of repression, so better to be potentially over- than under-inclusive if the human rights facilitation prohibition is not to be easily circumvented. The prohibition applied regardless of whether the engagement involved a formal contract, and its scope included services (e.g., consulting, engineering, hardware, or software) to support forbidden goods or technologies.²⁹³

Third, the amended statute directed the President to provide the appropriate congressional committees with a list (and updates to it) of persons he thinks “engaged in censorship.”²⁹⁴ By that, Congress meant they barred, restricted, or punished the freedom of expression, or limited access to the media (including,

²⁸⁸ Iran Threat Reduction and Syria Human Rights Act of 2012 § 401(a), *reprinted in* 2013 COMPILATION, *supra* note 11, at 735.

²⁸⁹ *Id.*

²⁹⁰ *Id.* § 401(b)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 735. Those committees were the Senate Foreign Relations and Banking, and House Foreign Affairs and Financial Services, Committees. *See id.* § 401(b)(3)(A)-(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 735-36.

²⁹¹ CISADA § 105A(b)(1), (b)(2)(A)(i), (b)(2)(B), (b)(4), *reprinted in* 2013 COMPILATION, *supra* note 11, at 713-14.

²⁹² *Id.* § 105A(b)(C), *reprinted in* 2013 COMPILATION, *supra* note 11, at 713.

²⁹³ *Id.* § 105A(b)(2)(A)(ii), (b)(2)(C), *reprinted in* 2013 COMPILATION, *supra* note 11, at 713.

²⁹⁴ *Id.* § 105B(b)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 714-15.

for instance, by jamming or manipulating international frequency signals).²⁹⁵ Note that Congress did not preface the forbidden behavior with the adverb “knowingly.” But, that preface was implicit. Censors surely know what they are doing, i.e., why interfere with freedom of expression unless suppression of thought, word, and picture is the intended consequence?

The 2012 Act relied on the same individually targeted sanctions CISADA specified for human rights abusers.²⁹⁶ Hence, officials transferring goods, services, or technologies used for serious human rights abusers, or censoring the press, were subject to restrictions on their bank accounts and other property. There was one exception to those sanctions, which concerned a particularly infamous recipient of torture instruments: Iran’s Revolutionary Guard Corps. If it was the transferee of a banned item, then any other sanction from the standard twelve-item menu (discussed below) under the 1996 Iran Sanctions Act (i.e., ILSA, as amended) as supplemented in 2010 by CISADA, also could be imposed on the transferor.²⁹⁷

J. 9th: Five of Twelve Sanctions

The aforementioned amendments to the 1996 Iran Sanctions Act and 2010 CISADA concerned forbidden transactions with Iran. Beyond tightening the sanctions regime by making more transactions unlawful, the 2012 Iran-Syria Act heightened penalties for illegal conduct. Instead of requiring the President to impose just three of nine sanctions on any person that knowingly engaged in a prohibited transaction, the 2012 Iran-Syria Act mandated imposition of 5 of 12 punishments.²⁹⁸ In upping the penalties, Congress further restricted the discretion

²⁹⁵ See *id.* § 105B(b)(1)(A)-(B), reprinted in 2013 COMPILATION, *supra* note 11, at 715.

²⁹⁶ See *id.* § 105A(c), B(a), reprinted in 2013 COMPILATION, *supra* note 11, at 714-15; see also Iran Threat Reduction and Syria Human Rights Act of 2012 § 601(a)(3), (b)(1), (b)(2)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 736 (authorizing the President to use his IEEPA authority to implement penalties under sections 105A and 105B of CISADA as amended by the 2012 Act).

²⁹⁷ See CISADA § 105A(c)(2)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 714.

²⁹⁸ See Iran Sanctions Act of 1996 § 5(a)(1)(A) (concerning development of petroleum resources), 5(a)(2)(A) (concerning production of refined petroleum products), 5(a)(3)(A) (concerning exportation of refined petroleum products to Iran), 5(a)(4)(A) (concerning joint ventures with Iran relating to developing petroleum resources), 5(a)(5)(A) (concerning support for the development of petroleum resources and petroleum products in Iran), 5(a)(6)(A) (concerning development of petrochemical products from Iran), 5(a)(7)(A) (concerning transportation of crude oil from Iran), 5(a)(8)(A) (concerning concealment of Iranian origin of crude oil and refined petroleum products), 5(b)(1) (concerning exports, transfers, or transshipments of goods, services, or technology relating to WMD or advanced conventional weapons), 5(b)(2)(A) (concerning joint ventures relating to mining,

of the President, thereby asserting more control over American trade policy toward Iran.

That is, Congress compelled the President to impose five, not just three, sanctions. But, it gave the President three more options from which to choose. Accordingly, the sanctions menu under the 2012 Iran-Syria Act contained the same nine items as those under the 1996 ILSA and 2010 CISADA scheme:

- (1) Export Financing Sanction,²⁹⁹
- (2) Export License Sanction,³⁰⁰
- (3) American Bank Loans Sanction,³⁰¹
- (4) Primary Dealer and Repository Sanctions,³⁰²
- (5) Government Procurement Sanction,³⁰³
- (6) Foreign Exchange Sanction,³⁰⁴
- (7) Inter-bank Transactions Sanction,³⁰⁵

production, or transportation of uranium), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 688-94.

That the changes discussed were made by the 2012 Iran-Syria Act may be inferred from the facts that mandating imposition of five of nine sanctions was not in the 2010 CISADA, and such a mandate would have been unlikely to be included in section 1245 or Sub-Title D, as those 2012 laws both were simply National Defense Authorizations.

²⁹⁹ Compare Iran Sanctions Act of 1996 § 6(a)(1), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(1), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 697.

³⁰⁰ Compare Iran Sanctions Act of 1996 § 6(a)(2), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(2), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 697.

³⁰¹ Compare Iran Sanctions Act of 1996 § 6(a)(3), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(3), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 697.

³⁰² Compare Iran Sanctions Act of 1996 § 6(a)(4)(A)-(B), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(4)(A)-(B), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 697.

³⁰³ Compare Iran Sanctions Act of 1996 § 6(a)(5), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(5), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 698.

³⁰⁴ Compare Iran Sanctions Act of 1996 § 6(a)(6), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(6), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 698.

³⁰⁵ Compare Iran Sanctions Act of 1996 § 6(a)(7), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1141, *with* Iran Sanctions Act of 1996 § 6(a)(7),

- (8) Property Transaction Sanction, and³⁰⁶
- (9) Additional Sanctions³⁰⁷

Plus, the 2012 legislation added the following three new punishment choices.

- (10) Equity or Debt Investment Sanction:³⁰⁸

First, the President could bar any United States person (natural or legal) from buying “significant amounts” of the equity or debt of a sanctioned person. So, hypothetically, if the Japanese multinational electronics corporation, Panasonic, were a sanctioned person, then the President could prohibit American individuals or firms from investing in Panasonic stock or bonds. (Whether he could compel divestment was uncertain, but not an option expressly listed in the menu.)

- (11) Corporate Officer Exclusion Sanction:³⁰⁹

Second, the President could exclude corporate officers. In particular, he could order the Department of Homeland Security to deny issuance of a visa to visit the United States to any officer, principal, or shareholder with a controlling interest in a sanctioned person.

To illustrate, consider a modified version of the facts in *United States v. Kaiga*, a 2013 criminal case involving export control violations.³¹⁰ Suppose the allegations in the *Kaiga* criminal complaint by the United States Attorney’s Office for the Northern District of Illinois are true: a Belgian businessman, living in Brussels, and affiliated with the Belgian company Industrial Metal and Commodities (IMC) shipped 7075 T6 aluminum tubes with an outside diameter of 4.125 inches and an ultimate

further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, supra note 11, at 698.

³⁰⁶ Compare Iran Sanctions Act of 1996 § 6(a)(8), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1141, with Iran Sanctions Act of 1996 § 6(a)(8), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 698.

³⁰⁷ Compare Iran Sanctions Act of 1996 § 6(a)(9), amended by CISADA, reprinted in OVERVIEW, PART II, *supra* note 19, at 1141, with Iran Sanctions Act of 1996 § 6(a)(12), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 698.

³⁰⁸ See Iran Sanctions Act of 1996 § 6(a)(9), further amended by Iran Threat Reduction and Syria Human Rights Act of 2012, reprinted in 2013 COMPILATION, *supra* note 11, at 698.

³⁰⁹ See *id.* § 6(a)(10), reprinted in 2013 COMPILATION, *supra* note 11, at 698.

³¹⁰ Plea, 13 C.R. 00531 (N.D. Ill. Oct. 31, 2013).

tensile strength of 572 megapascals.³¹¹ These tubes are used in aerospace products, and are controlled items for nuclear non-proliferation purposes under the Export Administration Act and International Emergency Economic Powers Act. The Belgian businessman did not obtain an export license as the shipment was from the tube supplier in Schaumburg, Illinois, to IMC in Brussels; none was needed for shipments to Brussels. In fact, the tubes were shipped from Schaumburg to a front company in Malaysia that was operated by a party with ties to Iran. This shipment violated American export control regulations because a license is needed for shipments to Malaysia.

Suppose the party with ties to Iran arranged for the tubes to be sent from Malaysia to Iran. Consequently, the Belgian businessman also violated American trade prohibitions against Iran. Assume IMC and the Malaysian intermediary also are found liable. Under the corporate officer exclusion sanction, any officer, principal, or controlling shareholder in IMC or the Malaysian intermediary – the sanctioned persons – could be barred from obtaining a visa to the United States. Note that the 2012 legislation did not define “controlling” in a rigid fashion. So a 51 percent shareholder might be considered to control IMC, but – given a more diffuse pattern of shareholding in the intermediary – perhaps a 15 percent stake would suffice.

(12) Principal Executive Officer Sanction:³¹²

Third, the President could impose any of the aforementioned 11 sanctions on high-ranking officials working for a sanctioned person. Such officials included “the principal executive officer or officers, or . . . persons performing similar functions and with similar authorities as such officer or officers.” This sanction was not tied to formal business titles, but rather targeted individuals with decision-making authority. The idea was that none of them should feel safe with the thought that they, personally, did not engage in prohibited conduct with Iran. All that mattered is they held an important post with an entity that did.

So, for example, in the above hypothetical based on the *Kaiga* case, consider the predicament of colleagues of the Belgian businessman working for IMC. They could be sanctioned, as could senior officers in the Malaysian intermediary.

³¹¹ See Michael Bologna, *Importer Charged in Scheme to Ship Controlled Aluminum Sources to Iran*, 30 INT’L TRADE REP. 1731 (2013).

³¹² See Iran Sanctions Act of 1996 § 6(a)(11), *further amended by Iran Threat Reduction and Syria Human Rights Act of 2012*, reprinted in 2013 COMPILATION, *supra* note 11, at 698.

Collectively, the three new sanctions pertained to corporate finance and officials. Their thrust was to strangle the Iranian economy by scaring individuals who might invest in or work for companies that did business with Iran. Put differently, they were an extension of the American strategy of imposing a secondary boycott on Iran, with this extension addressing private parties.

K. 10th: Arguably Tougher Waiver Criteria

The 2012 Act altered the criteria under which the President could waive the imposition of sanctions. Until that Act, the President could do so for any illegal transaction with Iran if he determined it was “necessary to the national interest” to do so.³¹³ Prior law did not clarify how long the waiver would last and did not give explicit authority to renew the waiver. The 2012 Act explicitly limited any waiver to one year, and concomitantly allowed for renewals of up to one year on a case-by-case basis.³¹⁴

The Act also bifurcated the substantive waiver criteria according to the type of prohibited conduct that occurred. Suppose that conduct concerned the energy sector of Iran. Then, the President could waive sanctions if it was “essential to the national security interests of the United States” to do so.³¹⁵ However, suppose the transgression was helping Iran develop WMDs or advanced military capabilities by Iran. Then, the President could waive sanctions if it was “vital to the national security interests” of America.³¹⁶

What is the difference between “essential” and “vital”? The Act did not answer that question. Arguably, helping Iran acquire a WMD was an even more serious violation than investing in its energy sector, or trading in its energy products, making “vital” a higher standard than “essential” to meet for a waiver.

³¹³ Iran Sanctions Act of 1996 § 9(c)(1), *amended by* CISADA, *reprinted in* OVERVIEW, PART II, *supra* note 19, at 1145.

³¹⁴ Iran Sanctions Act of 1996 § 9(c)(1)(C), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 702.

³¹⁵ *Id.* § 9(c)(1)(A), *further amended by* Iran Threat Reduction and Syria Human Rights Act of 2012, *reprinted in* 2013 COMPILATION, *supra* note 11, at 702.

³¹⁶ *Id.* § 9(c)(1)(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 702.

X. PHASE 10: 2013 DEFENSE ACT TIGHTENING ENERGY, SHIPPING, AND FINANCIAL SANCTIONS, PLUS SHIPBUILDING, PORT, AND PRECIOUS METAL SANCTIONS

A. Novel Link Between Iranian Human Rights Abuses and American National Security (January 2, 2013 Through December 31, 2016)

The Iran Freedom and Counter-Proliferation Act of 2012 was the final legislation against Iran before the November 2013 to January 2014 preliminary nuclear agreement. This legislation was Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013 (2013 Budget Act).³¹⁷ Thus, like the 2012 Budget Act, it tacked on sanctions against Iran to a defense appropriation bill, as doing so minimizes difficulties with congressional passage vis-à-vis a stand-alone measure concerning Iran.³¹⁸ In the 2013 Budget Act, the 113th Congress stressed the third and newest of its three rationales for the sanctions regime: fighting human rights abuses.³¹⁹

Congress expressly linked “the interests of the United States and international peace” to the “threat” of the “ongoing and destabilizing actions of the Government of Iran, including its massive, systematic, and extraordinary violations of the human rights of its own citizens.”³²⁰ That linkage was novel: Congress had not tied those violations to American national security in prior sanctions legislation. Why exactly those violations might undermine that security

³¹⁷ See Iran Freedom and Counter-Proliferation Act of 2012, Sub-Title D of the National Defense Authorization Act for Fiscal Year 2013 §§ 1241-55, *reprinted in* 2013 COMPILATION, *supra* note 11, at 736-48. Section 1241 sets out the short title.

³¹⁸ IEEPA penalties applied to actual or attempted conspiracies to violate the 2013 Defense Act, and the Act did not limit the authority of the President to apply yet more sanctions on Iran. See Iran Freedom and Counter-Proliferation Act of 2012 §§ 1253(a)-(b), 1255, *reprinted in* 2013 COMPILATION, *supra* note 11, at 748. But, sanctions under section 1254 of the 2013 Act do not apply to:

(i) [T]he Shah Deniz natural gas field in Azerbaijan’s sector of the Caspian Sea and related pipeline projects, (ii) projects that provide Turkey and European countries energy security and independence from Russia and Iran, or (iii) projects initiated before August 10, 2012, pursuant to a production-sharing agreement entered into with, or a license granted by, a government other than Iran’s before August 10, 2012. This is the same exception for natural gas projects found in ITRA [the 2012 Iran-Syria Act] Section 603(a).

Baker & McKenzie, *U.S. Congress Enacts Additional Sanctions Against Iran*, LEXOLOGY (Jan. 31, 2013), <http://www.lexology.com/library/detail.aspx?g=1dbeb762-9695-4817-88a8-f0130cf20844>.

³¹⁹ For a chart of the sessions of Congress distributed by Indiana University, see *Guide: Congressional Session Chart*, *supra* note 7.

³²⁰ See Iran Freedom and Counter-Proliferation Act of 2012 § 1243(a).

any more than human rights abuses in China was not entirely certain, but constructing a cogent argument was not difficult. Assume Iranian liberals and reformists are less interested in developing a WMD or sponsoring terrorists than their opponents, yet suppose the opponents crush their democratic movement. The victorious hardliners may have free rein to threaten America and its allies with a nuclear weapon or by funding terrorist causes.

Thus, via the 2013 Budget Act, Congress sought to impede the ability of the Iranian government to “oppress the people of Iran and to use violence and executions against pro-democracy protestors and regime opponents,” “jam or otherwise obstruct international satellite broadcast signals,” and bolster the ability of those people to secure “basic freedoms that build the foundation for the emergence of a freely elected, open, and democratic political system.”³²¹

B. Energy, Shipping, Shipbuilding, and Port Prohibition

Congress ordered the President to block all transactions in property or property interests located in, or coming into, the United States, or under the control of a United States person, of any person connected to the Iranian energy, shipping, or shipbuilding sectors, or to any Iranian port, or of any Iranian or sanctioned person knowingly helping such a person.³²² Further, the President had to impose five sanctions from the standard menu (discussed above) on such a person.³²³ Congress also designated any entity that operated a port in Iran, including the NIOC, NITC, and Islamic Republic of Iran Shipping Lines (IRISL), as “entities of proliferation concern.”³²⁴ Finally, Congress instructed the President to bar (or impose strict conditions on) any correspondent account or PTA in the United States of any foreign financial institution that conducts “significant financial transaction” for the sale, supply, or transfer of energy, shipping, or shipbuilding goods or services in Iran, including for ultimate use by the NIOC, NITC, and IRISL. Congress allowed a limited exception to the prohibition for

³²¹ See *id.* § 1243(b).

³²² See *id.* § 1244(c)(1)(A), (c)(2)(A)-(B), reprinted in 2013 COMPILATION, *supra* note 11, at 738-39. Such “help” could take the form of material, financial, technological, or other goods, services, or support to such a person. See *id.* § 1244(c)(1)(A), (c)(2)(A)-(B), reprinted in 2013 COMPILATION, *supra* note 11, at 738-39. Iranian or other blocked persons did not include Iranian banks that had not already been designated for the imposition of sanctions. See *id.* § 1244(c)(2)(iii)-(3), reprinted in 2013 COMPILATION, *supra* note 11, at 739. Importation of goods was not sanctionable under this measure. See *id.* § 1244(c)(1)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 739.

³²³ See *id.* § 1244(d)(1)(A), reprinted in 2013 COMPILATION, *supra* note 11, at 739. Importation of goods was not sanctionable under this measure. See *id.* § 1244(d)(1)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 739.

³²⁴ *Id.* § 1244(b), reprinted in 2013 COMPILATION, *supra* note 11, at 738.

humanitarian aid (food, pharmaceuticals, or medical devices) to Iran,³²⁵ and a waiver of sanctions if “vital to . . . [American] national security” and justified in a report to the appropriate congressional committees.³²⁶

Simply put, Congress yet again tightened the noose around Iranian energy, shipping, and banking, and created a new noose around Iranian shipbuilding and ports. Why did it do so? The answer is that notwithstanding its aforementioned re-affirmation of support for human rights causes in Iran, Congress stuck to its two long-standing policy justifications for the sanctions: deterrence with respect to a WMD and terrorism. In the 2013 Act, Congress explicitly found:

- (1) Iran’s energy, shipping, and shipbuilding sectors and Iran’s ports are facilitating the Government of Iran’s nuclear proliferation activities by providing revenue to support proliferation activities.

- (5) United Nations Security Council Resolution 1929 (2010) recognizes the “potential connection between Iran’s revenues derived from its energy sector and the funding of Iran’s proliferation sensitive nuclear activities.”
- (6) The National Iranian Tanker Company is the main carrier for the Iranian Revolutionary Guard Corps-designated National Iranian Oil Company and a key element in the petroleum supply chain responsible for generating energy revenues that support the illicit nuclear proliferation activities of the Government of Iran.³²⁷

These findings helped shape the new prohibitions and attendant penalties it established.

Despite sanctions from the 1996 ILSA, 2010 CISADA, and amendments wrought by the 2012 Iran-Syria Act and 2012 Defense Act, support for the energy

³²⁵ Iran Freedom and Counter-Proliferation Act of 2012 § 1244(e), *reprinted in* 2013 COMPILATION, *supra* note 11, at 740. The 2013 Defense Act also provided an exception linked to section 1245 of the 2013 Defense Act, namely, the new prohibition and attendant penalties applied to buying petroleum and petroleum products from Iran if the President determined that third country sources of these items were in sufficient quantities at reasonable prices so as to permit third country buyers to “reduce significantly” sourcing them from Iran. *Id.* § 1244(g)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 740. This exception meant the President had to monitor global petroleum and petroleum product market conditions, in addition to global crude oil supply and demand conditions thanks to the 2012 Defense Act.

³²⁶ *See id.* § 1244(i)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 741.

³²⁷ *See id.* § 1244(a)(1), (5)-(6), *reprinted in* 2013 COMPILATION, *supra* note 11, at 738.

and shipping sectors was getting through to Iran. Some of that assistance came from Iran's own shipbuilding and port facilities, which thanks to repairs and upgrades could be used by the likes of the NITC to transport NIOC crude oil. The sale proceeds could be used for a nuclear bomb or diverted to *Hezbollah*. Put simply, Congress moved to plug holes in the vertical supply chain, which started with its ban on FDI in energy exploration in 1996 and expanded to downstream petroleum products in 2010 and to financing and insurance for energy transactions in 2012.

C. Precious Metals Prohibition

Energy, shipping, and shipbuilding were not the only sectors, nor were ports the only routes, through which Iran and its Revolutionary Guard Corps obtained funds, goods, or services for possible use to acquire a WMD, sponsor terrorists, abuse human rights, or censor the press. Global commodities markets (other than energy) afforded another opportunity. Iran or the Guard could barter or swap gold, silver, or other precious metals for such purposes. For instance, it could exchange aluminum with a dealer in Johannesburg, South Africa, to acquire gold, which it then could list as an asset in its national balance sheet,³²⁸ and possibly then use that gold as payment for guidance systems for ballistic missiles.

Indeed, holding seven percent of total global mineral reserves,³²⁹ Iran had an incentive to do so: to skirt the American sanctions against the Iranian financial sector, which made electronic transfers of funds illegal. That Iran did so may be inferred from Congress opting to identify in the 2013 Defense Act a new kind of forbidden transaction with Iran: selling, supplying, or transferring, directly or indirectly, a commodity in any one of three broad categories:

- (1) Any "precious metal."³³⁰
- (2) Certain raw or semi-finished metals, specifically, "graphite, raw or semi-finished metals such as aluminum and steel, coal (including coking, fuel, or metallurgical coal),³³¹ and software for integrating industrial processes."³³²

³²⁸ See *id.* § 1245(e)(1)(B), (h), reprinted in 2013 COMPILATION, *supra* note 11, at 743 (concerning the definition of "national balance sheet of Iran" as the ratio of government assets to liabilities, and its listing of precious metals and other minerals as assets).

³²⁹ See *Mining in Iran*, COUNTRY MINE, <http://www.infomine.com/countries/iran.asp>; GLENN E. CURTIS & ERIC HOOGLUND, *IRAN: A COUNTRY STUDY* xxvii, 178-80 (5th ed. 2008) (concerning the Iranian mining industry, including aluminum).

³³⁰ See Iran Freedom and Counter-Proliferation Act of 2012 § 1245(a)(1)(A), reprinted in 2013 COMPILATION, *supra* note 11, at 736-37.

³³¹ See *id.* § 1242(a)(3), reprinted in 2013 COMPILATION, *supra* note 11, at 737.

³³² See *id.* § 1245(a)(1)(B), (d), reprinted in 2013 COMPILATION, *supra* note 11, at 742-43.

- (3) “Any other material” in the second category that Iran uses for its energy, shipping, or shipbuilding sectors, for any economic sector controlled by the Corps, or for its “nuclear, military, or ballistic missile programs.”³³³

Any person that knowingly (i.e., that knew or should have known about their conduct)³³⁴ transacted in these commodities with Iran was subject to five sanctions from the standard list.³³⁵

Likewise, Congress forbade any foreign financial institution from opening a correspondent account or PTA that the institution knew was used to facilitate a “significant financial transaction” associated with a sanctionable sale, supply, or transfer of precious metals or other listed commodities.³³⁶ In other words, what Congress barred was both underlying transactions in those items, and payments for such deals. Only if a person or financial institution “exercised due diligence” to eschew commodity transactions and payments, could the President exempt them from otherwise mandatory penalties.³³⁷ And only if it were “vital” to American national security could the President waive these prohibitions.³³⁸

D. Three Reinforcements of Existing Prohibitions

In the 2013 Defense Act, Congress buttressed three existing prohibitions and attendant sanctions. First, to strengthen the precious metals prohibition and the prohibition concerning the Iranian energy, shipping, shipbuilding sectors, and its ports, Congress supplemented rules from the 2012 Iran-Syria Act against providing underwriting, insurance, or reinsurance services to Iran. Congress expressly banned provisions of those services in any way that might benefit those sectors or ports, or help Iran transact in precious metals. Any person knowingly doing so was subjected to five or more penalties from the sanctions menu.³³⁹ This

³³³ See *id.* § 1245(a)(1)(C)(i)(I)-(III), reprinted in 2013 COMPILATION, *supra* note 11, at 742.

³³⁴ See *id.* § 1242(a)(9), reprinted in 2013 COMPILATION, *supra* note 11, at 737.

³³⁵ See Iran Freedom and Counter-Proliferation Act of 2012 § 1245(a), reprinted in 2013 COMPILATION, *supra* note 11, at 741-42. The prohibited conduct covered re-sales, re-supplies, or re-transfers, for example, through an intermediary that is a sanctioned person to an end user in Iran, like the Iran Revolutionary Guard Corps. See *id.* § 1245(a)(1)(C)(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 742.

³³⁶ *Id.* § 1242(c), reprinted in 2013 COMPILATION, *supra* note 11, at 742.

³³⁷ See *id.* § 1245(f), reprinted in 2013 COMPILATION, *supra* note 11, at 743.

³³⁸ *Id.* § 1245(g)(1)(A), reprinted in 2013 COMPILATION, *supra* note 11, at 743. If the President chose to exercise this waive discretion, then – as with other provisions in the sanctions regime – he was obliged to provide a written justification to the appropriate congressional committees, possibly with a classified Annex. See *id.* § 1245(g)(1)(B), reprinted in 2013 COMPILATION, *supra* note 11, at 743.

³³⁹ See *id.* § 1246(a)(1)(A), (B)(i)-(ii), reprinted in 2013 COMPILATION, *supra* note 11, at 743-44. The prohibition also applied to underwriting or reinsurance services for any

expanded denial of Iranian access to shipping insurance posed yet another challenge for the Islamic Republic to overcome in order to arrange for carriage of goods to its shores.

Second, to ostracize Iran further from global financial services, Congress clarified that it was illegal for a foreign financial institution to open a correspondent account or PTA in the United States, if that institution “knowingly facilitated a significant financial transaction” for any proscribed Iranian person or sanctioned entity.³⁴⁰ The mandatory penalty for running afoul of this bar was the familiar five-of-nine punishments selected by the President.³⁴¹ Here again, along with a humanitarian assistance exception, a third country short supply exception existed for financial transactions associated with petroleum or petroleum products, if the President determined the price and supply conditions did not allow for such countries to eschew significant sourcing from Iran.³⁴²

Though technically convoluted, a noteworthy exception existed for a foreign financial institution that facilitated:

- (1) Financial transactions pertaining to goods and services,³⁴³ or natural gas exports to or imports from Iran, which were

person sanctioned under the IEEPA that helped Iran acquire WMDs or support terrorism, or any other Iranian or blocked person listed by OFAC (excluding Iranian financial institutions not sanctioned). *See id.* § 1246(a)(1)(B)(iii)-(C), (a)(2), (b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 744.

Here, too, exceptions existed for (1) humanitarian exports to Iran, and (2) any person exercising due diligence to avoid the forbidden behavior, and there was Presidential waiver authority on the ground of “vital . . . national security” interest if justified to appropriate congressional committees. *See id.* § 1246(c)-(e), *reprinted in* 2013 COMPILATION, *supra* note 11, at 745. An exception also existed with respect to the bar, under section 6(a)(8) of the 1996 ISA, against any person from importing property within the jurisdiction of the United States in which a sanctioned person had an interest: such importation was not subject to the revised underwriting and insurance measure. *See id.* § 1246(a)(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 744.

³⁴⁰ *See* Iran Freedom and Counter-Proliferation Act of 2012 § 1247(a)-(b), *reprinted in* 2013 COMPILATION, *supra* note 11, at 741-45. OFAC maintained the list of proscribed persons, which as per the Section title were called “Specially Designated Nationals” or “SDNs.”

³⁴¹ *See id.* § 1247(a), *reprinted in* 2013 COMPILATION, *supra* note 11, at 745. Congress provided the President with the familiar waiver authority on the basis of “vital . . . national security” interests, with a justification to appropriate congressional committees. *Id.* § 1247(f)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 747.

³⁴² *See id.* § 1247(c)-(d)(1), *reprinted in* 2013 COMPILATION, *supra* note 11, at 746.

³⁴³ If the underlying commercial transaction involved goods or services other than natural gas, then to qualify for the exception, a foreign financial institution also had to be from a country holding primary regulatory authority over it that the President had certified, under the 2012 Defense Act, had significantly reduced or stopped crude oil purchases from Iran. *See id.* § 1247(d)(2)(A), *reprinted in* 2013 COMPILATION, *supra* note 11, at 746 (containing the additional qualification); National Defense Authorization Act for Fiscal Year 2012 § 1245(d)(4)(D)(i), *reprinted in* 2013 COMPILATION, *supra* note 11, at 719. In

- (2) Not subject to American sanctions, and were
- (3) Conducted directly between Iran and a third country with primary regulatory authority over the foreign financial institution, as long as
- (4) That institution credited any funds owed to Iran to an account in the third country.³⁴⁴

This intriguing exception presumably preserved both a modicum of bilateral trade between third countries and Iran, and denial of access by Iran to any cash from such trade.

For instance, the San Francisco, California branch of Hanmi Bank (HB) could open or maintain a correspondent account or PTA for the benefit of Iran, under the aforementioned conditions.³⁴⁵ But, to avoid American sanctions, HB would have to credit funds to the Iranian beneficiary to an account in South Korea, because South Korea is the country holding primary regulatory authority over HB. In effect, the exception forces a change in the location of the beneficiary's bank from any country in the world to the foreign bank's primary regulatory jurisdiction.

Third, Congress reinforced sanctions motivated by its human rights concerns. It ordered the President to penalize the Islamic Republic of Iran Broadcasting (IRIB), including specifically its President, Ezzatollah Zargami. It did so because IRIB and its President had "contributed to the infringement of individuals' human rights by broadcasting forced televised confession and show trials," thus "clear[ly] violat[ing] . . . international law with respect to the right to a fair trial and due process."³⁴⁶ The mandatory penalties were those set forth in CISADA for human rights abuses, including IEEPA penalties, visa denials, and asset freezes, as well as OFAC blacklisting.³⁴⁷

XI. NECESSARY, BUT NOT SUFFICIENT?

Six American Presidents and sixteen sessions of Congress, spanning nearly forty years, pursued a sanctions-based policy toward Iran. For most of that period, the results were plain enough: no change in behavior and deepened distrust,

other words, to avoid sanctions on their banks, third countries had to prove to the American President they tried to, or did, get oil from anywhere, but Iran.

³⁴⁴ See *id.* § 1247(d)(2)(B)(i)-(ii), (e)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 746.

³⁴⁵ See HANMI BANK, <https://www.hanmi.com> (last visited Mar. 8, 2014); *San Francisco*, HANMI BANK, <https://www.hanmi.com/about/branches/northern-california/san-francisco> (last visited Mar. 8, 2014).

³⁴⁶ Iran Freedom and Counter-Proliferation Act of 2012 § 1248(a)(1)-(2), *reprinted in* 2013 COMPILATION, *supra* note 11, at 747.

³⁴⁷ See *id.* § 1248(b)(1)(A)-(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 747. An exception to the requirement to impose sanctions existed for importation of goods. See *id.* § 1248(b)(1)(A)-(B), *reprinted in* 2013 COMPILATION, *supra* note 11, at 747.

even hatred. The “Great Satan” piled on sanctions. The “Evil *Āyatollāhs*” kept the centrifuges spinning, and even managed to procure more of them.

Then, on November 24, 2013, Iran agreed to a historic preliminary accord with the United States and five other signatories (collectively called the “P-5+1”), the five permanent United Nations Security Council members (China, France, Russia, United Kingdom, and United States), plus an additional European country (Germany).³⁴⁸ Israel dubbed the accord a “historic mistake.”³⁴⁹ Nonetheless, these countries subsequently elaborated on this *Joint Plan of Action*, also called the *Geneva Interim Agreement* or simply the *Iran Nuclear Deal*, and began its implementation on January 20, 2014.³⁵⁰ The Deal had an initial lifespan of six months.

The following Table summarizes the key points of the Plan, listing what Iran “gave” and what it “got.” Can it be inferred from the agreement that the sanctions worked? Were they both necessary and sufficient, first, in wrecking the economy of Iran, and second, in leaving Iran no choice but to agree to the Plan?

³⁴⁸ See *Iran Nuclear Deal: Joint Plan of Action – Full Text*, GUARDIAN (Nov. 24, 2013), <http://www.theguardian.com/world/interactive/2013/nov/24/iran-nuclear-deal-joint-plan-action> [hereinafter *Joint Plan of Action*]. Given that there are three European Union countries (France, Germany, and the United Kingdom), the P5+1 sometimes is referred to as the “E3+3” or “E3/EU +3.” See *id.*; Laura Smith-Spark & Jim Sciutto, “*Substantive Talks over Iran’s Nuclear Program*,” CNN (Oct. 16, 2013), http://edition.cnn.com/2013/10/16/world/meast/iran-nuclear-talks/index.html?hpt=hp_t3.

³⁴⁹ *Iran Nuclear Deal Makes Mid-East Peace Safer Place – Kerry*, BBC NEWS (Nov. 24, 2013), <http://www.bbc.co.uk/news/world-middle-east-25078961>.

³⁵⁰ The timetable for implementation was set in a January 2014 accord, which was not publicly released, and reportedly contained an informal addendum that was secret. See Paul Richter, *New Iran Agreement Includes Secret Side Deal, Tehran Official Says*, L.A. TIMES (Jan. 13, 2014), <http://www.latimes.com/world/worldnow/la-fg-wn-iran-nuclear-side-deal-20140113,0,4116168.story#axzz2rLwaPbUK>.

Table: Synopsis of Iran Nuclear Deal³⁵¹

What Iran “Gave” (What the United States “Got”)	What Iran “Got” (What the United States “Gave”)
<i>Conversion of Existing Stockpile of Highly Enriched Uranium</i> ³⁵²	
<p>From its existing Uranium enriched to 20 percent (that is, 20 percent Uranium Hexafluoride, UF₆), Iran dilutes (blends down) half the 20 percent Uranium to no more than 5 percent purity.³⁵³ There is no line for reconversion.</p> <p>Once the line for conversion of UF₆ enriched up to 5 percent purity to Uranium Dioxide (UO₂) is ready, Iran converts the 5 percent newly enriched Uranium to oxide UF₆, in accordance with a schedule of the conversion plant declared to the International Atomic Energy Agency (IAEA).</p>	<p>From its existing Uranium enriched to 20 percent, Iran retains the other half as working stock of 20 percent oxide for fabrication of fuel for the Tehran Research Reactor (TRR).</p>
<i>Further Enrichment</i> ³⁵⁴	
<p>Iran does not enrich Uranium over 5 percent purity.</p> <p>Iran also does not add any Uranium at the 3.5 percent enrichment level or higher to its current stock.³⁵⁵</p>	<p>Iran continues its safeguarded research and development (R&D), including enrichment R&D practices that are not designed to accumulate enriched Uranium.</p>

³⁵¹ The *Joint Plan of Action* is rather sketchy, and credible published analyses of its details are limited. Hence, the table draws on following additional sources to fill in certain details about provisions of the Plan. See Kelsey Davenport, *Iran, Implementation of the Joint Plan of Action at a Glance*, ARMS CONTROL ASS'N (Apr. 2014), <http://www.armscontrol.org/taxonomy/term/10/0>; *Geneva Interim Agreement on Iran Nuclear Program*, WIKIPEDIA, en.wikipedia.org/wiki/Geneva_interim_agreement_on_Iranian_nuclear_program (last visited Apr. 4, 2014); *Uranium Oxide*, WIKIPEDIA, http://en.wikipedia.org/wiki/Uranium_oxide (last visited Apr. 4, 2014); *Nuclear Fuel Cycle*, WIKIPEDIA, http://en.wikipedia.org/wiki/Nuclear_fuel_cycle#Enrichment (last visited Apr. 4, 2014); *Additional Protocol*, WIKIPEDIA, http://en.wikipedia.org/wiki/Additional_Protocol#Additional_Protocol (last visited Apr. 4, 2014); *Treaty on the Non-Proliferation of Nuclear Weapons*, WIKIPEDIA, http://en.wikipedia.org/wiki/Nuclear_Nonproliferation_Treaty (last visited Apr. 4, 2014).

³⁵² See *Joint Plan of Action*, *supra* note 348, at 1-2.

³⁵³ At the 5 percent purity level, uranium can be enriched for nuclear fuel, but not weapons, purposes. See Hossein Mousavian, *It Was Not Sanctions that Brought Tehran to the Table*, FIN. TIMES, Nov. 20, 2013, at 11. The concentration of 5 percent is suitable for operating a nuclear power station. At higher degrees of refinement, uranium serves in the core of a nuclear warhead. See Parisa Hafezi & Justyna Pawlak, *Breakthrough Deal Curbs Iran's Nuclear Activity*, REUTERS (Nov. 24, 2013), <http://www.reuters.com/article/2013/11/24/us-iran-nuclear-idUSBRE9AI0CV20131124>.

³⁵⁴ See *Joint Plan of Action*, *supra* note 348, at 1.

<i>Enrichment Capacity</i> ³⁵⁶	
<p>Enrichment Capacity:</p> <p>Iran does not make any further advances of activities at its:</p> <ul style="list-style-type: none"> (1) Natanz Fuel Enrichment Plant, (2) Fordow Enrichment Facility, or (3) Arak reactor (which the IAEA designated as IR-40).³⁵⁷ <p>In particular, with respect to Natanz and Fordow, Iran:</p> <ul style="list-style-type: none"> (1) Leaves inoperable 50 percent of the centrifuges at Natanz, (2) Does not install, or prepare for installation, any new centrifuges for Uranium enrichment at Natanz.³⁵⁸ (3) Leaves inoperable 75 percent of the centrifuges at Fordow,³⁵⁹ and (4) Does not use its more sophisticated IR-2 centrifuges for Uranium enrichment. <p>With respect to Arak, Iran does not:</p> <ul style="list-style-type: none"> (1) Commission this reactor. 	<p>Enrichment Capacity:</p> <p>Iran may manufacture items for its nuclear facilities off of the premises of those facilities, but it may not install any such items into the facilities.</p> <p>At Natanz and Fordow, Iran may replace existing centrifuges with centrifuges of the same type.³⁶⁰</p>

³⁵⁵ Uranium purified to 3.5 percent or below is considered low enriched. *There's a Chink of Hope*, *ECONOMIST*, Oct. 19, 2013, at 51-52.

³⁵⁶ See *Joint Plan of Action*, *supra* note 348, at 2.

³⁵⁷ Natanz and Fordow are underground Uranium enrichment facilities, with Fordow beneath a mountain. Geoff Dyer & John Reed, *Iran's Arak Plant Reveals Depth of Distrust*, *FIN. TIMES*, Nov. 13, 2013, at 6; Roula Khalaf, Lionel Barber, Najmeh Bozorgmehr & Geoff Dyer, *Rouhani Takes Tough Nuclear Line*, *FIN. TIMES*, Dec. 1, 2013, at 1. The heavy water reactor at Arak has been called "the second string of Iran's [nuclear] program," because it "has the potential to produce plutonium for a bomb" – possibly 5-10 kilograms "of weapons-grade plutonium, enough for a nuclear weapon every year." Dyer & Reed, note 357. If that were to occur, then it would be "invulnerable" to the kind of military attack the Israelis successfully conducted against the Iraqi nuclear reactor at Osirak in 1981 and a facility in Syria in 2007. *Id.* That is because, even though Arak is above ground, once it is loaded with nuclear fuel, it cannot be destroyed without causing tremendous damage to surrounding areas, as occurred with respect to Chernobyl in 1986. In sum, the Arak facility, which had been projected to be operational in late 2014, was "an alternative, plutonium, path to creating the fissile material for a nuclear bomb." *There's a Chink of Hope*, *supra* note 355.

³⁵⁸ See *Joint Plan of Action*, *supra* note 348, at 2 n.1.

³⁵⁹ This provision is set out in the *Joint Plan of Action*, *id.* at 2 n.2, which states that at Fordow, Iran will not further enrich over 5 percent at four cascades currently enriching Uranium, but not increase their enrichment capacity, and not feed UF₆ into the other twelve cascades, which are to remain non-operative.

³⁶⁰ See *id.* at 4 nn.1-2.

<p>(2) Make or transfer fuel or heavy water to the site of the reactor.</p> <p>(3) Test additional fuel, or produce more fuel, for the reactor.</p> <p>(4) Install remaining components in the reactor.</p> <p>Iran does add any new facilities for enrichment.</p> <p>Iran does not reprocess Uranium, or construct a facility capable of reprocessing.</p>	
<p align="center"><i>Enhanced Monitoring (International Inspections)</i>³⁶¹</p>	
<p>Iran provides (within three months of the January 2014 implementation) specific information to the IAEA, including:</p> <p>(1) its plans for nuclear facilities,</p> <p>(2) descriptions of each building on each nuclear site, including the design details of the Arak reactor, and of the scale of operations for each location engaged in specified nuclear activities, and</p> <p>(3) data on uranium mines and mills, and source material.</p> <p>Iran submits to the IAEA an updated DIQ for the Arak reactor.</p> <p>Iran agrees with the IAEA on steps for a “Safeguards Approach” for the Arak reactor.</p> <p>At Natanz and Fordow, Iran grants daily access to IAEA inspectors when inspectors are not present for the purpose of Design Information Verification, Interim Inventory Verification, Physical Inventory Verification, or unannounced inspections, so that inspectors may obtain offline surveillance records.</p> <p>Also at certain sites at Natanz and Fordow, Iran permits twenty-four hour surveillance cameras.</p> <p>Iran grants managed access to IAEA</p>	<p>Consistent with Iran’s plans, it may produce centrifuges for the purpose of replacing damaged machines.³⁶²</p>

³⁶¹ See *id.* at 2.

³⁶² See *id.* at 2 n.4.

<p>inspectors to:</p> <ul style="list-style-type: none"> (1) centrifuge assembly workshops, (2) centrifuge rotor production workshops and storage facilities, and, (3) Uranium mines and mills. <p>Iran responds to IAEA questions about possible military aspects of its nuclear program, and gives the IAEA data as part of the Additional Protocol (the model for which the IAEA established in 1997) that Iran is expected to sign with the IAEA.</p> <p>(Under an Additional Protocol to the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, or NPT), the IAEA receives more information from the signatory country about its nuclear activities, including imports and exports, has enhanced inspection access rights including to suspected locations on short notice, and greater administrative flexibilities, including automatic visa renewals for its inspectors.)</p>	
<p style="text-align: center;"><i>Sanctions Relief: Crude Oil and Related Insurance and Shipping</i>³⁶³</p>	
<p>Overall, all forms of sanctions relief amount to roughly U.S. \$7 billion. Of that, \$4.2 billion are revenues from crude oil sales that are transferred to Iran in installments as Iran complies with its obligations under the <i>Joint Plan of Action</i>.³⁶⁴</p> <p>Iran could revive its sagging crude oil industry. As of January 2014, Chinese state oil companies dominated the Iranian crude oil industry, and President Hassan Rouhani sought to attract large western energy multinationals to revive that industry, starting with a major address at the World Economic Forum in Davos, the first there by an Iranian President in ten years.³⁶⁵</p>	<p>The United States (and European Union) pauses efforts to cajole third countries to significantly reduce, and ultimately cease, buying crude oil from Iran, and agrees those countries may maintain their current average amounts of Iranian oil. In essence, the United States suspends its third country short supply measures.</p> <p>To facilitate third country oil sales, the United States (and European Union) also suspends sanctions on insurance and transportation for crude oil shipments.</p> <p>The United States (and European Union) also permits repatriation of an agreed amount of crude oil</p>

³⁶³ See *Joint Plan of Action*, *supra* note 348, at 3.

³⁶⁴ See Hafezi & Pawlak, *supra* note 353.

³⁶⁵ See Gideon Rachman & Ajay Makan, *Rouhani Tries to Lure Western Oil Majors to Iran*, FIN. TIMES, Jan. 24, 2014, at 3.

	revenue of Iran frozen in bank accounts overseas.
<i>Sanctions Relief: Petrochemical Products and Related Insurance and Shipping</i> ³⁶⁶	
	The United States (and European Union) suspends sanctions against exports from Iran of petrochemical products, and on services related to those exports, namely, financial, insurance, and transportation sanctions. ³⁶⁷
<i>Sanctions Relief: Precious Metals</i> ³⁶⁸	
Iran has access to U.S. \$1.5 billion of revenues from gold and precious metal trade. ³⁶⁹	The United States (and European Union) suspends sanctions on precious metals (including gold), and on services related to transactions in precious metals involving Iran, namely, financial, insurance, and transportation sanctions.
<i>Sanctions Relief: Autos and Aircraft</i> ³⁷⁰	
	<p>The United States suspends sanctions against Iran with respect to auto and auto parts, and related financial, insurance, and transportation sanctions.</p> <p>The United States permits licensing for (1) export licensing of spare parts for safety of flight of Iranian civil aircraft (including, but not limited to, Iran Air),³⁷¹ (2) installation services for these parts, and (3) repair and safety inspections services for those aircraft, and (4) suspends related financial, insurance, and transportation sanctions.</p>
<i>Possible New Sanctions</i> ³⁷²	
	The American President will not

³⁶⁶ See *Joint Plan of Action*, *supra* note 348, at 3.

³⁶⁷ See *id.* at 3 n.5 (“associated services” are identified in a non-exclusive manner).

³⁶⁸ See *id.* at 3.

³⁶⁹ See Hafezi & Pawlak, *supra* note 353.

³⁷⁰ See *Joint Plan of Action*, *supra* note 348, at 3.

³⁷¹ See *id.* at 3 n.6.

³⁷² See *id.* at 3.

	<p>impose any new nuclear-related sanctions, and will discourage Congress from imposing any such sanctions.³⁷³</p> <p>The European Union and United Nations Security Council also will refrain from imposing any new nuclear-related sanctions.</p>
<i>Humanitarian Issues</i> ³⁷⁴	
<p>Via the humanitarian financial channel, Iran can use its oil revenues frozen in overseas to acquire food and other agricultural products, medicine, medical devices, and to pay for medical expenses incurred outside Iran, and thereby fulfill some of its domestic needs.</p> <p>Also via this channel, Iran may make payments (1) for United Nations obligations, (2) to overseas universities hosting Iranian students for their tuition expenses (up to a defined threshold).</p>	<p>The United States establishes a financial channel to facilitate trade with Iran for humanitarian purposes. Only designated foreign banks, or non-sanctioned Iranian banks, may participate in the channel.</p> <p>(Similarly, the European Union increases its thresholds to an agreed level for which it authorizes non-sanctioned trade with Iran (so called “authorization thresholds”).</p>

If asking whether statements of the players are to be believed, then the answer is “it depends who is asked.” The American President said “unprecedented sanctions and tough diplomacy helped to bring Iran to the negotiating table.”³⁷⁵ The Iranian narrative was different: diplomacy mattered more than sanctions.³⁷⁶ Both sides can point to facts supporting their opposing views that sanctions were necessary and sufficient, or not, to pressure Iran economically so as to force it to bargain. A fair assessment is the midpoint between the two perspectives: sanctions were a necessary, but not sufficient, cause to pressure Iran economically to sign the nuclear accord.

For the United States, it is true that sanctions helped wreck the Iranian economy. The ever-growing number of transactions it forbids and the ever-larger number of attendant sanctions it created hurt Iran. Before the tightening of

³⁷³ Geoff Dyer & Najmeh Bozorgmehr, *Obama Lobbies Senate Democrats to Drop Plan for More Iran Sanctions*, FIN. TIMES, Jan. 15, 2014, at 4.

³⁷⁴ See *Joint Plan of Action*, *supra* note 348, at 3.

³⁷⁵ Quoted in Richard McGregor & Geoff Dyer, *U.S. and Iran Start Sanctions Countdown*, FIN. TIMES, Jan. 13, 2013, at 3.

³⁷⁶ For examples of this narrative, see, for example, *Diplomacy, Not Sanctions Key to Securing Iran Nuclear Deal*, RT (Nov. 25, 2013), <http://rt.com/op-edge/role-of-diplomacy-iran-deal-263/>.

sanctions in 2012, the Iranian economy was “fragile.”³⁷⁷ Following their tightening, the challenges worsened. Numerous realities evinced the parlous state of Iran’s economy, including:

- (1) The Gross Domestic Product (GDP) of Iran shrank by 6 percent in 2012, and another 5 percent in 2013.³⁷⁸ In the year up to October 2013, GDP declined by 6 percent.³⁷⁹
- (2) The value of the Iranian *rial* relative to the U.S. dollar tumbled by over 50 percent between January 2012 and October 2013.³⁸⁰
- (3) In October 2013, Iran’s unemployment and inflation rates were 30 and 40 percent, respectively³⁸¹ – in effect, a monstrous combination of joblessness and price hikes called “stagflation.” In January 2014, inflation had eased only to 36 percent.³⁸²
- (4) In 2011 and 2012, Iran’s revenues from daily crude oil sales fell 60 percent.³⁸³
- (5) In 2011, Iran produced 3.5 million barrels of oil per day.³⁸⁴ In September 2013, that figure fell to the lowest level since 1989, just after the September 1980 to August 1988 Iran-Iraq War: 2.58 million barrels per day. In 2012 alone, and through January 2014, Iran’s production of crude oil dropped from 3.7 to 2.7 million barrels per day.³⁸⁵ These drops were harbingers of a further fall in sales receipts.
- (6) For decades, roughly U.S. \$50 billion in Iranian funds have been frozen outside of Iran as a result of sanctions, i.e., Iran has not had access to a large sum of funds.³⁸⁶

³⁷⁷ See *The Best v. The Not-Too-Bad*, *ECONOMIST*, Oct. 19, 2013, at 16.

³⁷⁸ See Rachman & Makan, *supra* note 365; *The Best v. The Not-Too-Bad*, *supra* note 377, at 16-17.

³⁷⁹ See *The Best v. The Not-Too-Bad*, *supra* note 377, at 16.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² See *Nothing Idyllic*, *ECONOMIST*, Jan. 11, 2013, at 42.

³⁸³ See Yeganeh Torbati & Lesley Wroughton, *Kerry Meets Iran Foreign Minister to Close Gaps in Iran Nuclear Talks*, *REUTERS* (Nov. 8, 2013), <http://mobile.reuters.com/article/topNews/idUSBRE9A709G20131108?irpc=932>.

³⁸⁴ See Najmeh Bozorgmehr, *Iran Poised to Offer Lucrative Oil Deals*, *FIN. TIMES*, Oct. 29, 2013, at 1.

³⁸⁵ See Rachman & Makan, *supra* note 365.

³⁸⁶ See Torbati & Wroughton, *supra* note 383.

- (7) The Iranian travel and tourism market was “stagnant” between 2006 and 2013, despite the country being “home to a treasure trove of antiquities and world class archaeological sites.”³⁸⁷

Still, in evaluating whether sanctions truly caused the damage, it is important not to confuse correlation and causation, or over-attribute causation to one independent variable amidst others.

On the one hand, other intervening domestic and foreign variables may have contributed to Iran’s woes. For example, there likely was self-inflicted damage caused by internal political upheaval and mass street protests (or the prospects thereof), which exacerbated an unpredictable, uncertain climate for business. Assuredly, the global economic recession commenced in 2008 dampened demand for Iran’s energy products and interest in investing in its energy sector. On the other hand, the vicissitudes appear to follow the tightening of sanctions and tend to mount with the 2012 legislative changes. It strains credibility to assert the long, strong arm of American justice had no effect in deterring prospective investors and traders from dealing with Iran. Surely among the many that dearly wanted to, at least some calculated that the risk of detection and punishment offset any anticipated returns.

Conversely, for Iran, internal economic mismanagement and corruption also helped wreck the economy, along with a “suffocating security atmosphere.”³⁸⁸ That is, the sanctions hardly were the sole cause of Iranian woes. Even climate change played a role. Global warming (along with neglectful government) helped diminish water supplies in *qanats* – trenches created 3,000 years ago to irrigate Ancient Persia whereby water from aquifers beneath mountains flows across hundreds of miles.³⁸⁹ So, Iranian pistachio output has fallen.

Amidst self-inflicted wounds and shifts in Mother Nature was prideful determination:

Contrary to the claims of some U.S. lawmakers and Israeli officials, sanctions only caused a dramatic rise in nuclear capability, as Tehran sought to show it would not respond to pressure. Before, Iran was enriching uranium to below 5 percent at one site with 3,000 centrifuges and possessed a minute stockpile of enriched uranium. Today [i.e., four days before signing the Joint Action Plan], it is [enriched to] 20 percent at two sites with 19,000 centrifuges. It has a stockpile

³⁸⁷ See Monavar Khalaj, *Iranian Tourism Rises from the Ruins as Thaw in Relations Entices Foreigners*, FIN. TIMES (Nov. 17, 2013), <http://www.ft.com/cms/s/0/7be25910-40a4-11e3-8775-00144feabdc0.html#slide0> (posted as *Hope Glimmers for Iran’s Tourism Industry*).

³⁸⁸ *Nothing Idyllic*, *supra* note 382, at 42.

³⁸⁹ *See id.*

of 8,000 kg of enriched uranium and more sophisticated centrifuges.³⁹⁰

Moreover, of enormous significance to Iran's participation in the Joint Action Plan were two points.

First, the United States "red line . . . changed from 'no enrichment of uranium' to 'no nuclear bomb.'"³⁹¹ That is, America ceased to insist Iran could not enrich uranium at all, which it had done up through 2005, when negotiations with Iran failed:

In past negotiations, the U.S. demanded that some Iranian nuclear facilities should be closed in exchange for a modest reversal of sanctions. But, this dialogue failed, partly because it was never made clear to Iran what kind of nuclear program it would retain in the long run.³⁹²

The Joint Action Plan does commit the United States to recognizing the right of Iran to enrich uranium for peaceful purposes. Whether such a "right" exists in International Law itself may be a question. Still, the accord "gave Iran *de facto*, if not explicit, recognition" to do so.³⁹³ So, in signing the deal, America pivoted to the narrower goal of denying Iran a nuclear weapon. To be sure, the latter goal was the explicit one in American sanctions rules, so whether there was a change in substance or rhetoric is unclear. But, at least from the perspective of Iran, there was a meaningful shift whereby it could enrich uranium for peaceful nuclear energy purposes and maintain its long-standing disinterest in a nuclear weapon.

Second, the election of Hassan Rouhani as President of Iran mattered. He sought "rapprochement" with America, Europe, and other countries.³⁹⁴ Generally, perhaps the new President, like an earlier predecessor, Mohamed Khatami (1943–, who was President from 1997-2005), understood the importance of Iran not being a pariah state in a globalized world, and sought to avoid a clash of civilizations. Specifically, perhaps he embodied changes in style and substance in part to help bring about relief from the suffering inflicted on his people by the sanctions. Softening Iran's position in nuclear negotiations was necessary if America was to loosen the sanctions, which in turn was needed if the people who voted him into office in a "landslide" election were not to be disappointed.³⁹⁵ That is, the causal chain may have been from (1) sanctions to (2) economic pressure to (3) the election of a moderate to (4) agreement from Iran's Supreme

³⁹⁰ Mousavian, *supra* note 353.

³⁹¹ *Id.*

³⁹² *Give Iran a Limited Right to Enrich*, FIN. TIMES, Oct. 21, 2013, at 12.

³⁹³ See Roula Khalaf, Lionel Barber & Najmeh Bozorgmehr, *Rouhani Celebrates Triumph of His First 100 Days*, FIN. TIMES, Nov. 25, 2013, at 2.

³⁹⁴ See Mousavian, *supra* note 353.

³⁹⁵ See *The Best v. The Not-Too-Bad*, *supra* note 377, at 16.

Leader, *Āyatollāh* Ali Khamenei to sign a deal.³⁹⁶ But that chain was by no means assured and the 2005 election of a hard liner before Mr. Rouhani, that is, of Mahmoud Ahmedinejad, who was President until 2013, suggests a “rally around the flag” effect may have occurred amidst sanctions.

In sum, have American sanctions against Iran worked? Have they caused economic pain to Iran that, in turn, caused a change in the behavior of the Iranian government in respect of its nuclear ambitions? A resolute “no” is implausible. Iranians suffered economically. But, an unqualified “yes” gives the Americans more credit than they deserve. The sanctions regime was a work in progress, ultimately evolving into a tight noose; it was not a carefully designed and comprehensive regime from inception.

If the question of efficacy is about achieving policy goals, then the sure answer is indeterminate. Whether the deal becomes a permanent one, and sees Iran without WMDs in the long run, is uncertain. Moreover, nothing in the terms of the agreement address two of the three American justifications for sanctions: deterring Iran from sponsoring cross-border terrorism, and promoting human rights, including press freedom, in Iran. In the context of entry into this agreement, the United States made a strategic decision to champion one policy goal, and set aside two others – at least for an indeterminate period.

Time will tell whether a sanctions regime that the most powerful nation in human history designed, and that evolved into the most comprehensive set of economic strictures on a foreign country in human history, was necessary and sufficient to achieve all of its purposes. Until then, what is certain for as long as the prohibitions and penalties remain in place is that their sheer technical intricacy creates plenty of work for international trade lawyers.

As for America and Iran, if the two countries were individuals, then a psychologist surely would label their relationship dysfunctional, and recommend therapy. Perhaps the sanctions-induced Joint Action Plan is the start of that therapy towards a modality other than confrontation.



³⁹⁶ See *id.* at 16-17.